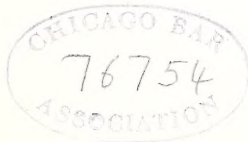




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AUG 3 '60

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400 - 32341

COURTENAY BARBER,

Plaintiff - Appellee,

v.

THE KINGSLEY - MILLER COMPANY,

Defendant - Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed October 3, 1928

MR. PRESIDING JUSTICE HOLDOM delivered the opinion of the court.

While this case, together with general number 32192, with the same title, were consolidated for hearing, counsel have prepared separate records, and abstracts and written separate briefs in each case. We shall in this opinion, in the main, decide both the cases. As a matter of fact both cases are identical in all the proofs. The second record is but a repetition of the first and so agreed by the stipulation of the parties. The controversy in the two cases involves three promissory notes made by the General Automotive Corporation, which was afterwards merged into the defendant corporation, to the order of Harvey S. and Charles A. Pardee, and by them endorsed and delivered (so plaintiff claims) to plaintiff before their maturity. In the instant case one note only was involved. There was a trial before the court and jury. On the motion of plaintiff the court directed the jury to return a verdict in favor of plaintiff and against defendant for the sum of \$5825, which the jury did, and on which verdict a judgment was rendered after the court's overruling motions for a new trial and in arrest of judgment, and the record is before us for review by appeal of defendant.

AUG 3 '60

250 I.A. 625

400 - 33341

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

COURTNEY BARBER,
Plaintiff - Appellee,
v.
THE KINGSTON - MILLER COMPANY,
Defendant - Appellant.

Opinion filed October 3, 1958

MR. PRESIDING JUSTICE HOLCOM delivered the opinion
of the court.

While this case, together with General number 33192, with the same title, were consolidated for hearing, counsel have prepared separate records, and separate and written separate briefs in each case. We shall in this opinion, in the main, decide both the cases. As a matter of fact both cases are identical in all the proofs. The second record is but a repetition of the first and so agreed by the stipulation of the parties. The controversy in the two cases involves three promissory notes made by the General Automotive Corporation, which was afterwards merged into the defendant corporation, to the order of Harvey B. and Gailen A. Priden, and by them endorsed and delivered (so plaintiff claims) to plaintiff before their maturity. In the instant case one note only was involved. There was a trial before the court and jury. On the motion of plaintiff the court directed the jury to return a verdict in favor of plaintiff and against defendant for the sum of \$2825.50 which the jury did, and on which verdict a judgment was rendered after the court's overruling motions for a new trial and in arrest of judgment, and the record is before us for review by appeal of defendant.

ruling actions for a new trial and in arrest of judgment the court entered a judgment against the General Automotive Corporation upon the finding in the total sum of \$16,328.14. From this judgment defendant prayed and perfected this appeal.

As changed and modified by this opinion, the opinion this day handed down in Case No. 32341, between the same parties, is adopted as the opinion of this court in this case. The attention of counsel and the trial court is directed to an infirmity in the finding and judgment in this case. The finding and judgment are against "General Automotive Corporation" when they should have been against the defendant in the case, The Kingsley Miller Company. Before entering upon the trial the General Automotive Company was eliminated from the case and the Kingsley Miller Company made defendant in its stead and the pleadings, etc., amended by order to conform to the change thus created. This is undoubtedly a clerical error and the Municipal Court is directed to amend the finding and judgment by striking therefrom the name "General Automotive Corporation" and in lieu thereof inserting the name of defendant. "The Kingsley Miller Company."

The former case 32341 by the opinion above referred to, is reversed and the cause remanded for a new trial for the main reason that the trial judge, as in that opinion pointed out, usurped the function of the jury in deciding and directing a verdict. While such action constituted error where the same was tried before a jury, different principles of law prevail where the trial is had before a judge.

In a trial before the judge, he, the judge, decides both questions of fact and law arising in the case. He is to

judging actions for a new trial and in excess of judgment the court entered a judgment against the General Automotive Corporation upon the finding in the total sum of \$18,328.14. From this judgment defendant prayed and perfected this appeal.

As changed and modified by this opinion, the opinion this day handed down in Case No. 32341, between the same parties, is adopted as the opinion of this court in this case. The attention of counsel and the trial court is directed to an in- fidelity in the finding and judgment in this case. The finding and judgment are against "General Automotive Corporation" when they should have been against the defendant in the case. The Kingsley Miller Company. Before entering upon the trial the General Automotive Company was eliminated from the case and the Kingsley Miller Company made defendant in its stead and the misdirection, etc., amended by order to conform to the change thus created. This is undoubtedly a clerical error and the Municipal Court is directed to amend the finding and judgment by striking therefrom the name "General Automotive Corporation" and in lieu thereof inserting the name of defendant, "The Kingsley Miller Company."

The former case 32341 by the opinion above referred to, is reversed and the cause remanded for a new trial for the main reason that the trial judge, as in that opinion pointed out, usurped the function of the jury in deciding and discussing a ver- dict. While such action constituted error where the case was tried before a jury, different principles of law prevail where the trial is had before a judge.

In a trial before the judge, the judge, decides both questions of fact and law relating to the case. He is to

judge of the credibility of the witnesses and of the weight and probative force of the evidence. He may believe some witnesses and disbelieve others in arriving at his decision, just as the jury may do in arriving at their verdict. Furthermore, in a trial before a judge the court of review will assume that the judge based his conclusions upon evidence only which the record demonstrates was, from a legal view point, properly admissible. So this court will assume that all of the irrelevant proof pointed out in our opinion supra were disregarded by the trial judge in forming the ultimate conclusions to which he arrived and which find expression in his final judgment. We have scanned the proofs found in the record with diligence and care, and therefrom we are prepared to hold, and do so hold, that the legitimate and admissible proofs in the record fully sustain and justify the conclusions, finding and judgment of the trial judge in this case. Therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

WILSON AND TAYLOR, JJ. CONCUR.

Judge of the credibility of the witnesses and of the weight and probative force of the evidence. He may believe some witnesses and disbelieve others in arriving at his decision, just as the jury may do in arriving at their verdict. Furthermore, in a trial before a judge the court of review will assume that the judge based his conclusions upon evidence only which the record demonstrated was, from a legal view point, properly admissible. So this court will assume that all of the five points pointed out in our opinion were disregarded by the trial judge in forming the witness conclusions to which he arrived and which find expression in his final judgment. We have examined the proofs found in the record with diligence and care, and therefore we are prepared to hold, and do so hold, that the legitimate and admissible proofs in the record fully sustain and justify the conclusions, findings and judgment of the trial judge in this case. Therefore the judgment of the Municipal Court is affirmed.

APPROVED.

WILSON AND TAYLOR, JJ. CONCUR.

25 C. L. 251

32192

COURTNEY BARBER,

Appellee,

APPEAL FROM

v.

MUNICIPAL COURT

OF CHICAGO.

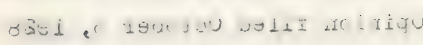
THE KINGSLEY MILLER COMPANY,

Appellant.

Opinion filed October 3, 1928

MR. PRESIDING JUSTICE HOLMAN delivered the opinion of the court.

The record in this case is in all respects the same as that in General Number 32341, in which we have coincidentally with this opinion handed down an opinion in that case. There are two notes involved in this case, each dated on the same date as the note in General Number 32341, made by the same maker, the General Automotive Corporation, payable to the same payees, the Pardess, and by them indorsed and delivered before maturity to the plaintiff, Courtney Barber, for a valuable consideration, each of said two notes being for the sum of \$6,250. By agreement of the parties the demand for a jury was waived and the cause submitted to the court for trial. The court considered and adjudged the cause on the transcript of the record in case No. 32341, by the agreement of the parties. After hearing counsel and considering the record aforesaid, the trial judge made the following finding, viz. "The court finds the issues against the defendant, General Automotive Corporation, and assesses the plaintiff's damages at the sum of twelve thousand five hundred and 00/100 dollars (\$12,500) on principal and three thousand eight hundred twenty and 14/100 dollars (\$3820.14) interest." After over-



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When it first is detected, however, it is not as easy to
eliminate. It is not as easy to eliminate as it is to
prevent. There are two main reasons for this. First,
it is not as easy to detect. It is not as easy to
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to eliminate as it is to prevent. There are two main
reasons for this. First, it is not as easy to detect.
It is not as easy to detect as it is to prevent. Second,
it is not as easy to eliminate as it is to prevent.

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...the

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the activities of the British Communist Party.

This case and the one, General Number 24132, have been in this court before, and are reported respectively in 240 Ill. App. 85 and 241 Ill. App. 604. We refer to the opinions in these cases for a statement of the issues there involved and which are the same issues as in the two cases now before us for review. Both cases were reversed and remanded "for further proceedings not inconsistent with the views set forth in this opinion." Both cases were docketed in this court as *Courtenay Barber v. General Automotive Corporation*. On the new trial, by stipulation of the parties, it was agreed that the name of defendant had been changed to "The Kingsley Miller Company" and the pleadings were amended in conformity with the stipulation.

Before passing to the consideration of the questions which call for a reversal of the Municipal Court judgment we will notice and rule on some preliminary questions arising on the ruling of the trial judge regarding the admission, first, of the decisions of this court in the former reviews of the cases involved in the two appeals now before us.

Defendant offered in evidence as exhibits 10, 11 and 12 three opinions of this court each entitled *Courtenay Barber v. General Automotive Corporation*, bearing general numbers 30279, 30843 and 30413. The opinions related to reviews of the record in the cases now before us and were proper to be received in evidence, so that the court might be correctly guided in the admission or not of evidence in the conduct of the new trial of the cases ordered by this court to be had in such opinions. These opinions were not admissible as evidence to be taken by the jurors to their jury room when considering of their verdict, but for the consideration of the trial judge in making his rulings upon evidence proffered and in the giving of instructions to the

[illegible]

jury on the law of the case. To this limited extent these opinions were properly received.

Defendant offered in evidence as exhibits 6, 7, 8 and 9, being the opinions in cases General Numbers 30,693 and 30,692, and judgments in the same cases, in which the parties were General Automotive Corporation, plaintiff, and Charles A. Pardee in one case, and Harvey S. Pardee in the other, were defendants, and in which cases plaintiff recovered in this court separate judgments against the two Pardees, in a matter to which Barber was a stranger and in no way connected. An objection by plaintiff was sustained and the opinions and judgments rejected. This ruling of the trial judge was without error. It is clear that none of these proceedings involved Barber. He was not a party in either case. He could not be held in any way responsible for what occurred in a suit to which he was not a party. Furthermore the opinions of this court by statute have no force of law in any case other than the one in which such opinions are rendered.

The contention of defendant that Barber voluntarily dismissed the suit pending in the Circuit Court involving the note in the instant case and thereby constituted a retraxit and that plaintiff in consequence thereof lost his right of action thereon and cannot maintain this suit is not supported by the record. We find that the record abundantly sustains plaintiff's contention that the Circuit Court suit was dismissed by the agreement of the parties and that by such action he neither surrendered nor lost any right to further maintain this action. Jacobs v. Marks, 183 Ill. 532, and on further review in the Supreme Court of the United States reported in 183 U.S. 583, is

decisive of the question contrary to the contention of defendant. Furthermore a voluntary dismissal of an action is no bar to its further maintenance in another forum. What our Supreme Court said in Jacobs v. Marks, supra, is equally applicable to Barber's action in dismissing his Circuit Court suit, viz.,

"Here as the evidence showed * * * there was no recovery by plaintiff of her damages and no satisfaction. The effect of the transaction * * * was a mere dismissal of her action or an abandonment of her action as against the furniture and lumber company, for which she recovered nothing in return, and we are aware of no principle upon which it can be held that the record in the furniture and lumber company case can be treated as a bar to the present action."

The U. S. Supreme Court held in different language to the same purport and effect.

The attempt to set off against plaintiff the claim of defendant against the payees and indorsers of the notes in suit, the two Pardees, being separate judgments against each, was violative of precedent and practice. There must be mutuality of parties to justify a claim of set-off at law. A single indebtedness for instance, by way of example, cannot be set-off against a joint indebtedness, nor vice versa. The right of set-off is a creature of the statute and unknown to the common law. The two separate judgments of defendant against the Pardees were for different sums of money, the judgments were several and not joint. On no theory advanced by defendant could it set off, either of the Pardee judgments against the plaintiff's claim. Sec. 47, Chap. 110, title "Practice" R.S. III.; Sec. 12, Chap. 99, R.S. III. title "Negotiable Instrument Act."

Under the foregoing sections a set off may be pleaded and maintained against the holder of a note who took it after maturity and we are of the opinion, the record considered,

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JAMES M. HARRIS

THE REPORT TO THE ATTORNEY GENERAL OF THE

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

that it is not seriously disputed but that plaintiff received the notes, in both actions, three notes in all, before maturity, and for a valid consideration. The Bardee judgments were in favor of defendant's predecessor in title, the General Automotive Corporation, and it is clear, beyond all peradventure, that at no time was there any contractual relationship between it and the plaintiff. The general doctrine applicable to this situation is as stated in Weid v. McKinney, 302 Ill. App. 129, thus:

"In an action by an indorsee of notes against the maker, claims not arising out of any transaction where a contractual relation existed between plaintiff and defendant, or matters or claims between them on which an independent action could have been maintained by defendant against plaintiff, are not properly set off against plaintiff's claim."

In Gregg v. James, et al., 1 Ill. 143, the court said:

"Nothing is better settled than that debts to be set off, must be mutual and between the parties to the record. * * * The only inquiry is, was the debt alleged to be due by Philips a debt which could be set off. The note is payable to co-partners, and the debt offered to be given in evidence, is due, if at all, by only one of the co-partners. This rule is, that a debt due individually by one co-partner can not be set off in an action to recover a debt due the co-partnership. It is not a mutual debt, nor is it between the parties to the record."

The Bardees are not parties to the record in either this or the other case. No. 32,132. The doctrine of Gregg v. James, supra, is one of the earliest cases reported in Illinois and the doctrine there promulgated has never been departed from.

Hinckley v. Best, 9 ibid. 136 and Burgwin v. Babcock, 11 ibid. 28, are to a like effect and in the latter case it was laid down as a condition precedent to the right of set off that "The demands must be mutual and between the parties to the action".

In Dameier v. Beyer, 167 Ibid. 547, it was held that "A joint indebtedness cannot be set off against a separate demand, nor can a separate demand be set off against a joint indebtedness. a debt to be subject to set off must be mutual between the parties." It is clear that there is no mutuality between the parties to this suit, and the judgments of defendant's predecessor against the Pardees, the subject of the contended set off in this and its related action.

In Priest v. Dodsworth, 335 ibid. 613, it was again laid down as the law in actions of set off that "demands to be the subject matter of set offs must be mutual between all the parties to the action." Again in Stuart v. Lott, 304 Ill. 170, it was said "Nothing is better settled than that debts to be set off must be mutual between the parties to the record."

While there are other reasons why the court was without jurisdiction to take cognizance of defendant's set off to plaintiff's action, the foregoing dicta is controlling and it was error for the court to admit evidence of the set off and in not, after erroneously hearing it, to exclude it from the record. From the fact that defendant received the consideration for the three notes in this and cause No. 32193, it is estopped to deny its liability because of any technical defect in executing them. Merchants National Bank v. Nichols, 223 Ill. 41; Rosehill v. Dempster, 323 ibid 567; Aurora v. Paddock, 50 ibid. 782; Ottawa v. Murray, 15 ibid. 336; Bradley v. Ballard, 55 ibid 413; Klein v. Independent Brewing Association, 331 ibid. 594; Sargent v. McDonough, 197 Ill. App. 533.

In Johnson v. Johnson, 127 Ill. 247, it was held that "a joint interest cannot be created by a conveyance to two persons, one of whom is to have the whole, and the other a life interest, unless the instrument expressly so provides." It is clear that there is no similarity between the parties in this case, and the interests of Johnson's estate and Johnson's estate, the subject of the bequest and the will, in this and its related matter.

In Johnson v. Johnson, 127 Ill. 247, it was again held that as the law in relation to the subject of the bequest and the will, and the subject of the bequest and the will, is the same, it is not necessary to distinguish between the parties in the matter.

It is clear that the subject of the bequest and the will, and the subject of the bequest and the will, is the same, it is not necessary to distinguish between the parties in the matter.

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It is axiomatic that the law is for the decision of the judge and what the facts are in a given case is the sole function of the jury. A verdict cannot be directed except when a plaintiff fails to maintain by proofs his cause of action as a matter of law. The trial judge erred in directing a verdict for plaintiff. Plaintiff's counsel in many ways admits inferentially that there was conflict in the evidence which needed to be reconciled in order to solve the questions of fact arising from the evidence. This the judge did and thereby invaded the functions of the jury. We will quote a few of these instances from plaintiff's brief. It was claimed by defendant that the notes were ante-dated and counsel say: "The evidence on this point was conflicting as shown by counsel's review of the same on page 27 to 44 of his brief." This was for the jury to solve and not the court. Again counsel argue "that Barber did not receive notice of this agreement not to negotiate, is nevertheless important in sustaining the court's judgment on the credibility of Kingsley", - a clear invasion of the jury's function. And again, "We feel quite sure that Judge Trude gave a great deal of weight and credence to her (Miss Jung) testimony and her demeanor on the witness stand entirely warranted it," - another instance of the judge deciding disputed questions of fact. Again counsel argue "That this young lady was an honest witness and a witness with a good memory will appeal to this court, as it did to Judge Trude, if this court will read in detail the questions and answers constituting her examination. On this conflict of evidence between these two sets of witnesses, the important thing is the light it throws upon the credibility of the witnesses Mr. Kingsley and Mr. Miller", etc. And the following: "The trial judge had the benefit of looking at the

notes himself and he could see that Miss Jung was correct". To so decide was the duty and function of the jury who were the judges of the facts and of the credibility of the witnesses and not the judge. Counsel further argue: "The trial court evidently believed Mr. Barber and not Mr. Kingsley. " The judgment of the court in favor of the plaintiff also requires the inference that he believed Barber and not Kingsley". And again, "It is further apparent from Mr. Barber's testimony, which the trial judge believed instead of the testimony of Mr. Kingsley."

These clear invasions by the trial judge of the province of the jury cannot be disregarded in view of the law which allocates to the judge the law and to the jury the facts. Each arm of the court must act within its legal function and right in the trial of all cases, and neither must trespass upon the function of the other.

For the foregoing reasons the judgment of the Municipal Court is reversed and the cause is remanded for a new trial in accord with the views in this opinion expressed.

REVERSED AND REMANDED.

WILSON and TAYLOR, JJ. Concur.

noted directly and he would not have been any more satisfied. In
no doubt and the only one showing of the fact that the law
judges of the fact and of the possibility of the evidence
and not the judge. General Walker stated "The fact that
intentionally believed by the judge and not the jury." The
judgment of the court is based on the evidence of the judge
the evidence that is believed by the judge and not the jury.
again, "It is the judge's duty to believe the evidence of the
judge and not the jury. The judge is the one who believes of the
evidence."

There is no doubt by the fact that the
judges of the fact cannot be distinguished in view of the law
which is the law of the judge and the fact of the law.
There is no doubt that the judge is the one who believes of the
evidence in the trial of all cases, and the judge is the one who
believes of the evidence.

For the foregoing reasons the judges of the
evidence cannot be distinguished and the judge is the one who
believes of the evidence in the trial of all cases.

THE JUDGE IS THE ONE WHO BELIEVES OF THE EVIDENCE.

THE JUDGE IS THE ONE WHO BELIEVES OF THE EVIDENCE.

32804

ZEMON CONSTRUCTION CO., INC.,
a Corporation,

Appellant,

v.

WALTER J. WITZKE,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed October 3, 1928

MR. PRESIDING JUSTICE HOLDEN delivered the opinion
of the court.

The plaintiff brought this suit against the defendant claiming the sum of \$315.95, with interest, for insurance premiums and for a guaranty title policy on real estate owned by the defendant, upon which the plaintiff contracted to build a four apartment building, the property being located on the southwest corner of Major and Cornelia Avenues, in the City of Chicago.

The defendant filed a counter-claim claiming \$780 for loss of rent from August 1, 1926 to November 1, 1926, which resulted from plaintiff's not delivering to defendant the building completed on the first day of August, 1926.

There was a trial before the court without a jury, in which plaintiff failed and defendant succeeded, with an assessment of damages against plaintiff and in favor of defendant for the sum of \$640, and plaintiff brings the record here for review.

There was a written contract between plaintiff and defendant and defendant's wife, Mildred Witzke. The contract price was \$21,130, which the contract stipulates "shall include the cost of all labor, the cost of all materials and of all

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commissions for loans required as hereinbelow set out" and it was contemplated that the owners mortgage the property to enable them to pay plaintiff the contract price. The contract further provides that "the owners agree to furnish an owners' guaranty policy brought down to the date hereof in an amount equal to the aggregate of the mortgages to be placed thereon"; and again it is provided that the owner directs the contractor to effect and maintain fire insurance and tornado insurance upon said structure, etc.

The plaintiff procured fire insurance and paid the premiums thereon, and also paid the premiums to the Chicago Title & Trust Company for guaranteeing the title of defendant and his wife to the land upon which the plaintiff erected the building, and also an expenditure for preparing trust deeds and notes and other papers in connection with the land of defendants upon which plaintiff contracted to and did erect a four apartment building.

It was also provided that the contractor should not be liable for any failure to insure, etc.

It would seem reasonable from the contract between the parties that the insurance against fire being for the benefit of the owners, and the title guaranty policy guaranteeing the title of the owners to the land upon which the building was to be erected, defendant should pay the premiums on the fire and title insurance policies. That would seem to be the natural interpretation of the contract, including the relationship of the parties toward each other under the contract.

In the course of the trial the court ruled against statements made by defendant's wife. This was error, as she was a party with her husband to the contract with plaintiff, and her

conversations regarding the subject matter were admissible as against defendant. However, as the case must be again tried, we do not intend to pass upon the facts nor the conflicting claims.

An examination of the contract fails to disclose any time limit within which plaintiff agreed to complete the erection of and deliver the four apartment building covered by the contract to defendant. It appears that one W. Shaefer, who solicited defendant to enter into the construction contract, requested defendant to sign some mortgages in accord with the terms of the contract. This defendant refused to do until he received a writing to the effect that the building would be completed on or before August 1, 1926, and that Shaefer prepared and delivered a letter to that effect to defendant. It is claimed that such action on the part of Shaefer was not within the scope of his authority as salesman, and therefore did not bind the plaintiff. Be that as it may, it will be a question of fact for a jury to pass upon, or the court, if the jury is waived, and after considering all the evidence on the subject to determine whether or not the letter regarding the time in which the building should be completed was within the employment and authority of Shaefer.

Plaintiff assigns for error and argues for reversal that he was not accorded a fair and impartial trial. As contended for by plaintiff the record bristles with erroneous rulings and statements of the trial judge, tending to show that the findings and judgment were not rendered on an impartial hearing and an analysis or weighing of the facts and applying the law thereto, but that the court evidenced heat of passion and prejudice against the plaintiff. On counsel's motion to strike certain matters from the testimony of a witness, the court said: "Do you want everything stricken out except that which is favorable to you?" This was

brought forth by plaintiff's counsel's motion to strike out as incompetent and immaterial the statement of defendant to the effect that Zemon, President of the plaintiff company, started a building of his own across the corner from that of defendant at the same time defendant's building was commenced, and that Zemon finished his own, neglecting and "stalling" on defendant's building. This was highly improper and evidenced rather a partial than an impartial judicial mind. An improper remark of the trial judge was as follows: "The stenographer is instructed to physically strike out every remark that has been made by counsel. He cannot put any speech in the record. Strike everything out physically said by counsel." And thereafter would not hear any evidence offered on behalf of plaintiff's counsel. This was an improper ruling because plaintiff had a right, not only to make the offer, but to keep it in the record for review by this court as to its admissibility. Such conduct by the trial judge indicated unfairness.

The court again remarked, addressing the witness, Zemon: "You should have done all the coaching before and talking before you took the witness stand." There was no justification for such remark in the record.

While the witness Zemon was on the stand, he was shown several bills sent by him to defendant for fire insurance and title policy premiums. In sustaining an objection to the introduction of letters sent defendant asking for settlement of plaintiff's claim of \$315.95, the court sustained the objection on the ground that they were self serving, and observed " I see no reason why you should send bills to him". This is indicative of the mind of the court on a very simple proposition. If plaintiff had a claim

against defendant it was proper to send a bill therefore to defendant, and if enough of them were sent without any response from defendant objecting thereto, such action of defendant might be considered as defendant's acquiescing in the correctness of the bills so sent, and in law regarded as an account stated between them.

And the further remark of the court "Any body can draw up a statement and send it out" was very far fetched and altogether inappropriate. Several times the court sustained objections when no objections were made. They were the objections of the court and not of counsel.

There are many other remarks of the court set forth in the record which evidences the hostility of the court to plaintiff and his claim, but already enough has been quoted to sufficiently show the improper and biased attitude of the court toward the plaintiff's claim.

Because of the conduct of the court as above recited, and in order to enable the parties to have a fair and unprejudiced trial which the constitution and laws of this state accord to them, the judgment of the Municipal Court will be reversed, and the cause remanded for a new trial in accordance with law and judicial precedent.

REVERSED AND REMANDED.

TAYLOR AND WILSON, JJ. CONCUR.

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41 - 32632

IDA L. SANDBERG,

Appellant,

v.

EVA HAMILTON, JOHN A. LIND, LOUIS J. MEYER, JOHN E. TRAEGER and JAMES A. CREIGHTON, members of and comprising the Zoning Board of Appeals under the Chicago Zoning Ordinance and Amendments thereto, and CHRISTIAN F. PASCHEN, Building Commissioner of the City of Chicago, and the BUILDING COMMISSIONERS OF THE CITY OF CHICAGO and AXEL E. WAGNUSON,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

Opinion filed October 3, 1928

MR. PRESIDING JUSTICE NOLSON delivered the opinion of the court.

This is an appeal from a decretal order entered in the Circuit Court of Cook County on the petition of plaintiff (appellant here) Ida L. Sandberg, praying for the issuance of a writ of certiorari to the respondents (appellees here). In this order there is set forth a statement of facts with the conclusions of the court on both law and fact. We adopt the said order together with its recitations and conclusions as a part of this opinion. The order is as follows:

"This cause having come on to be heard by this (the Circuit) Court, on the duly verified petition of Ida L. Sandberg, praying for the issuance of a writ of certiorari directed to Eva Hamilton, John A. Lind, Louis J. Meyer, John E. Traeger and James A. Creighton, members of and comprising the Zoning Board of Appeals under the Chicago Zoning Ordinance and amendments thereto, which petition was filed in this court on the 29th day of November, 1927, and upon the writ of certiorari issued out of this court on November 30, 1927, and directed to said members of the Chicago Zoning Board of Appeals and upon the return to the writ of certiorari by the respondent, the Chicago Zoning Board of Appeals, duly filed herein, and upon

1. *Chlorophyll a* and *Chlorophyll b* contents were determined by the method of Arar and Johnson (1977).

42

THE FOLLOWING INFORMATION WAS OBTAINED FROM THE
RECORDS OF THE CHICAGO POLICE DEPARTMENT
ON THE DATE OF THE SEARCH AND SEIZURE
OF THE ABOVE NAMED VEHICLE AND THE
FINDINGS OF THE SEARCH AND SEIZURE
WAS AS FOLLOWS:

Opinion filed October 7, 1987

1998

This is an extract from a document dated 1941. The document is a letter from the British Foreign Office to the American State Department. The letter is dated 1941 and is signed by the British Ambassador in Washington, Sir Horace Rumbold. The letter discusses the British position on the Lend-Lease program and the British government's policy on the sale of arms to the United States. The letter is a copy of the original document and is marked with a large 'X' in the top right corner. The text is written in a cursive script and is somewhat faded. The letter is a copy of the original document and is marked with a large 'X' in the top right corner. The text is written in a cursive script and is somewhat faded.

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the duly verified petition of Ida L. Sandberg heretofore filed herein praying for a speedy hearing and the issuance of a restraining order as therein prayed, and coming on further to be heard upon the oral evidence adduced in open hearing before this Court, and the Court having heard said testimony, having examined the return to the writ of certiorari, having examined the documentary evidence presented to this cause, and having heard the arguments and statements of counsel and being fully advised in the premises, finds:

1. That a three-story and English basement brick apartment building, containing thirty-seven apartments is being constructed at the northeast corner of the intersection of Ainslie street and North Hermitage avenue in the City of Chicago, Cook County, Illinois, which premises are otherwise known as Nos. 4901 - 4907 North Hermitage avenue, and that said building is being constructed by the owner, A. E. Magnuson, under a permit issued to him by the Building Commissioner of said City of Chicago, and the premises so occupied consist of two lots fronting on North Hermitage avenue, each fifty feet wide, and one hundred sixty-five feet long, extending to an alley twenty feet wide.

2. That the said lots appear to be out of square, and the main front walls of said building at the north line of the premises occupied by the same extend back a distance of thirteen feet, two and three-eighths inches, and at the south line of said premises a distance of twelve feet nine inches from the street line, and that said building so situated does not violate the average building line as determined by the Chicago Zoning Ordinance of the buildings existing at the time of the passage of said Zoning Ordinance, namely, April 5, 1923, in said block on the east side of North Hermitage avenue between Ainslie street and Winnemac avenue. The Court finding that under the construction of said ordinance it is difficult to fix the distance of said average building line definitely and that if there is any deviation from the same in the building under construction it appears to be so slight as not to do any harm or create any damage, and as not warranting the Court in interfering with the construction of said building on account thereof at this time.

3. That said building covers in area 11,375.15 square feet of the premises in question, of which 5,483.64 square feet occupy the lot on the corner, and known as Lot No. 5, while 5,891.51 square feet thereof occupy the inner lot known as Lot No. 6; that under Subdivision M of Section 2 of said Ordinance defining a lot for the purposes of said Ordinance, the entire premises on which the said A. E. Magnuson is constructing and erecting said building, namely, the tract of land fronting 100 feet on North Hermitage avenue and extending 165 feet from the street to the alley, is to be considered a lot for the purposes of said Ordinance, the area of which premises is 16,500 square feet; that under the

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1. The first section of the report is devoted to a general description of the work done during the year. It includes a summary of the work done in the various departments of the Institute, and a statement of the progress made in the various branches of the work.

provisions of said Ordinance the property in question is in a second volume district, and the building in question shall occupy no more than seventy-five per cent of the area of the corner lot and sixty per cent of the area of the inner lot, and that said seventy-five per cent however, is limited to 8,000 square feet of the corner lot, and that under the provisions of said Ordinance, namely, Subdivision X of Section 21, the area of said building may be distributed over the entire lot; that, therefore the area which said building may occupy under the provisions of said Ordinance is seventy-five per cent of 8,000 square feet or 6,000 square feet plus sixty per cent of 8,500 square feet or 5,100 square feet, or a total of 11,100 square feet, so that the building occupied more area than is permitted by said Ordinance to the extent of 275.15 square feet.

4. That said building has two large light courts, and has a court or areaway on the north side of said property which is unobstructed and extends from the alley towards the front of the building a distance of 128 feet 3 5/8 inches, and being 4 feet wide, and that the nearest walls of the neighboring buildings being the buildings of the petitioner herein, Ida L. Sandberg, are as follows: A one-story brick garage on the rear of the adjoining property, the wall of which for a distance of 21 feet 11 1/2 inches comes within 3 inches of the north line of the premises in question and within 4 feet 3 inches of said wall of said court or areaway. The nearest wall of a two-story frame residence on the rear of the adjoining lot comes within 3 feet 6 inches of said north line of said premises, or within 7 feet 6 inches of said wall of said areaway, and the nearest wall of the two-story brick apartment building on the front of the adjoining property being a wall of the bay thereof, comes within 18 feet 3 inches of said north line, or 22 feet 3 inches of said north wall of said court or areaway; that the building in question has progressed in its construction to a point where all of the walls thereof have been erected, and the first, second and third floor joists have been erected and constructed, and the walls of said building in the rear thereof are within 4 feet from the roof line, and in the front thereof up to the third floor, and that said building is to cost between \$225,000 and \$250,000, \$141,000 of which has already been expended by said owner in the construction thereof; that \$25,000 of said sum has been drawn from a first mortgage of \$175,000 placed upon said building; that said building is designed to be, and intended to be a high-class building, and when completed will be a much better building than any of the other buildings in said block, or within said immediate vicinity.

5. That the defendant A.E. Magnuson, hereinbefore made an additional party defendant or respondent in this cause, purchased the property at 4901 - 7 Hermitage avenue, Chicago, Cook County, Illinois, in the month of March 1927, and that on September 1, 1927, procured from the Commissioner of Buildings of the City of Chicago

a building permit to erect a thirty-seven apartment building on said premises, which consists of two lots at the northeast corner of the intersection of Ainslie street and North Hermitage avenue, Chicago, Cook County, Illinois; that each of said lots as platted are fifty feet in width and one hundred sixty-five feet in length and are rectangular in shape; that each of said lots extends to the eastward from North Hermitage avenue to an alley twenty feet in width; that work on said proposed building began in the latter part of the month of September by tearing down two buildings, one of which had been on each of said lots, and that it was not until about October 6, 1927, that the relator Ida L. Sandberg, had any knowledge that the proposed building would violate any of the provisions of the Chicago Zoning Ordinance hereinafter mentioned, and that on October 11, 1927, an appeal was filed from the decision of the Commissioner of Buildings of Chicago with the Zoning Board of Appeals, acting under the Chicago Zoning Ordinance and amendments thereto; that the Zoning Statute of the State of Illinois provides that on an appeal being filed with the Zoning Board of Appeals, the appeal stays all proceedings in furtherance of the action appealed from unless the officer from whom the appeal is taken certified to the Board of Appeals that a stay would in his opinion cause imminent peril to life or property; that no such certificate from the Building Commissioner has been shown in evidence or shown to have been issued; that said work continued with an interruption of only one or two days thereafter, at which time the Building Commissioner allowed the building work to continue after the respondent Magnuson had personally called upon the Building Commissioner for a conference and to ask why the work had been stopped; that the work continued thereafter until November 2, 1927, when another order was issued by the Commissioner of Buildings to stop the work on said building; that on this occasion the work was stopped until November 23, 1927, and until after the decision and resolutions of the Zoning Board of Appeals thereafter mentioned; that from and since November 23, 1927, the work has continued without interruption, except as prevented by inclement weather and except for the interval between Friday, December 23d, and Wednesday December 28th, during which period the work was stopped pending hearings before this Court.

6. That on October 29, 1927, the relator, Ida L. Sandberg, filed a new and additional appeal before the Chicago Zoning Board of Appeals, which was given Zoning Board No. 435-27-A, in which the relator objected to the action of the Building Commissioner and set forth that the building covered more of area than was permitted by the Chicago Zoning Ordinance; that thereafter and on November 8, 1927, the respondent Magnuson filed an appeal in Appeal No. 446-27-A, in which he set forth that the building covered an area of 968 square feet more than that permitted by the ordinance and prayed the Zoning Board to make a variation or an exception to the terms of the Zoning Ordinance and to release and discharge the stop order which had been put upon the building by the

Commissioner of Buildings on November 2, 1927; that the hearing on Appeals 435-27-A and 446-27-Z were held before the Board on November 15, 1927, and thereafter on November 22, 1927 the Zoning Board, by its resolutions, denied the appeal of the relator Ida L. Sandberg in Appeal 435-27-A, and allowed the appeal of the respondent Magnuson in Appeal No. 446-27-Z and granted to said Magnuson a variation or an exception from the terms of the Zoning Ordinance and permitted that said building be erected or continue to be erected so as to cover 968 square feet more of area than was permissible by the strict terms, regulations and restrictions of the Chicago Zoning Ordinance; thereafter the matter was brought to this Court by the writ of certiorari to review and revise the several orders and resolutions of the Zoning Board of Appeals.

7. That the said A. E. Magnuson, owner of the said premises upon which said building is being constructed, was ignorant of the fact that said building occupied more area of said premises than permitted by the said Chicago Zoning Ordinance; that the area exceeded by the building in question is only 275.15 square feet; that said building has progressed in its construction to a point where to require a modification or change in the construction thereof would necessitate the tearing down of walls and the destruction of a number of apartments and would affect the mortgage on said building and property and thereby greatly interfere, if not prevent the completion of the building; that the damage to the said A. E. Magnuson, owner of said premises, would be very great, if not destructive of the enterprise without materially benefitting the petitioner or anyone else; that if the Court by a mandatory injunction should order any wall and portion of said building removed to the extent of 275.15 square feet, the owner, A. E. Magnuson would have the option of selecting the portion to be removed; that if he selected the alley side, it would do no good to the petitioner or anyone else; that the alley in the rear of said premises is 20 feet wide; that the Building Commissioner and the Zoning Board of Appeals have permitted the said owner to progress with the construction of said building under and by virtue of said permit, until he has progressed to the point indicated as aforesaid; that a mandatory injunction requiring said owner, A. E. Magnuson, to remove and destroy 275.15 square feet of his present building would do him unjustly great harm, and no one any good.

It is * * * decreed by the Court that the decision of the Zoning Board of Appeals in said first appeal, namely No. 411-27-A involving the building line be and the same is hereby affirmed; and that the decisions of the said Zoning Board of Appeals in case No. 435-27-A and Case No. 446-27-Z, be and the same are hereby reversed. The prayer in any and all of said petitions for a restraining order or injunction against the construction of said building or against A. E. Magnuson is and are denied."

The plaintiff, appellant, asks this court to set aside the order appealed from in this proceeding, and to remand the cause to the Circuit Court "with directions to enter an order completely quashing and setting aside the orders and resolutions of the Zoning Board in Appeal Cases 411-27-A, 435-27-A and 448-27-Z * * and to enter a mandatory order * * against defendant Magnuson to compel the alteration of the building in question so that it shall be reduced in area by 968 square feet, and to be removed back to thirteen feet ten inches from the front street line."

An examination of the evidence in the record constrains us to concur in the finding of the trial court that under the construction of the ordinance it is difficult to fix the average building line definitely, and that if there is any deviation from the same in the construction of the Magnuson building, "it appears to be so slight as not to do any harm or create any damage and as not warranting the court in interfering with the construction of said building on account thereof at this time."

While the trial court found that the Magnuson building covered more area than permitted by the ordinance to the extent of 275.15 square feet, yet under the ordinance the Zoning Board in view of the fact that plaintiff suffered no injury to her adjoining property by reason thereof, had power to make a variation or exception to the terms of the Zoning Ordinance, etc. It appeared in evidence at the time of the hearing now being reviewed by this court that the Magnuson building had been so far constructed that all the walls were completely erected and that the first, second and third floor joists had been completed, and that the walls in the rear of the building to within four

See also 20-61 21-61 22-61 23-61 24-61 25-61 26-61 27-61 28-61 29-61

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an examination of the evidence in the case of the

Under the first count found that the defendant's testimony was not credible and that the defendant's testimony was not credible and that the defendant's testimony was not credible.

feet from the line of the roof, and in the front thereof to the third floor had been completed; that the total cost of the structure was to be \$225,000, of which amount there had already been expended upon the erection of the building \$65,000, which sum was part of \$175,000 raised by Magnuson by a first mortgage on the property. We are fully in accord with the findings of the trial court that the plaintiff nor her adjoining property have in no wise been damaged by the departure in the construction of the Magnuson building from the letter of the Zoning Ordinance. On the contrary to grant to plaintiff the relief now sought by her, which fails to be of any material financial benefit to her or her adjoining property, would inflict a large financial loss to Magnuson in requiring practically a reconstruction by him of his building. In effect these are the grounds on which the trial court based its decision. We are strongly inclined to hold that in so doing it was within the spirit if not the letter of the ordinance.

Plaintiff's improvements on her property adjoining Magnuson's are somewhat antiquated and out of date, while the improvements of Magnuson's building are modern and architecturally ornamental and an improvement of moment to the neighborhood of both plaintiff's and Magnuson's property. A court under these circumstances would not be justified in disturbing the situation unless the spirit, as well as the letter, of the Zoning Ordinance demanded it, and we agree with the trial court, for the reasons stated in the findings, that no good purpose would be served to any party in interest before the court in acceding to plaintiff's demands.

Great stress is laid by counsel for plaintiff on the case of Foratman v. Joray Holding Co., 216 App. Div. (N.Y.) 135.

1980-1981

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1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a very important document, as it contains the President's message to Congress, which is a key part of the executive branch's communication with the legislative branch. The letter is written in a formal, official style, and it is signed by the President.

We have examined that case with much interest. However, we are unable to see on fact, law or logic that it is comparable to the case at bar. There the defendant knew that he was violating a building ordinance to which his attention was called in apt time to have proceeded in accord with the ordinance, but instead of so doing he hastened construction in an attempt to avoid an injunctive order. His conduct was aggressively inequitable. In the instant case Magnuson had no idea that his neighbor, the plaintiff, had any cause of complaint against him in the erection of his building, and did not learn of her hostility until the building had progressed a large way toward completion. At no time did he do any act in an attempt to impede plaintiff in proceeding against him. So far all the tribunals to which she has submitted her claim have disagreed with her in her contentions. At the most Magnuson's offending is but slight and under the ordinance is cured by variance allowed by the Zoning Board, as set forth in the findings of the Circuit Court, hereinabove recited.

We find no error in procedure in the Circuit Court or in any of its rulings.

Defendant Magnuson filed an additional abstract and asked that the cost of it be taxed against plaintiff. As it was unnecessary the request will not be granted.

For the reasons aforesaid the decretal order of the Circuit Court in this appeal is affirmed.

AFFIRMED.

WILSON and TAYLOR, JJ., CONCUR.

to have expected that case with some interest. However, we
are unable to see on that, for we think that it is impossible
to the case at law, where the defendant says that he was the
losing a betting agreement to which the plaintiff was willing
to give in some amount in money with the plaintiff,
but because of no being in interest mentioned in an affidavit
to wait an important case. His mother was apparently
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Court, therefore decided.
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plaintiff that he is not in interest.

(1711)

THOMAS and JAMES, JR., 1888.

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RAE NEEDLEMAN,

Appellee,

v.

CHICAGO RAILWAYS COMPANY, et al,

Appellants.)

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed October 3, 1928

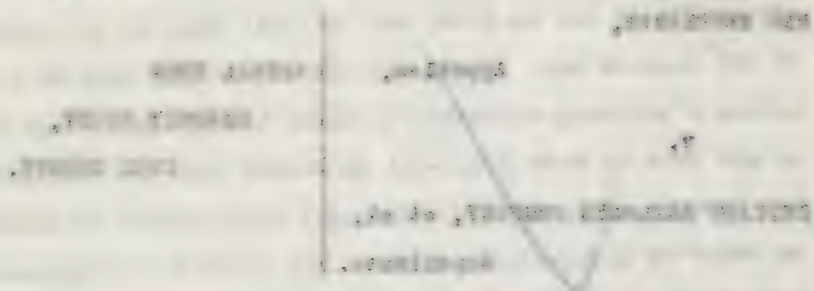
MR. PRESIDING JUSTICE HOLBOM delivered the opinion of the court.

This is an action on the case for personal injuries. To a three count declaration, the third of which was afterwards withdrawn, defendants interposed a plea of not guilty. As no questions arise upon the pleadings they will not be further referred to.

The plaintiff claims that she was severely injured while lawfully upon a car of defendants, through defendants' servants in charge of the car, after the same had come to a stop and while she was in the act of alighting therefrom, suddenly and without warning to her, starting the car in motion, throwing her violently to the ground. Defendants, on the contrary, contend that plaintiff, while the car was in motion, jumped therefrom and through her own careless act was injured. The contention of the plaintiff is that at and before the time of the accident she was in the exercise of due care for her own safety, and contrariwise this the defendants deny, and insist that they were not guilty of any act of negligence which proximately or otherwise caused or contributed

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to cause plaintiff's injuries complained about.

There was a trial before court and jury with a resulting verdict of guilty with damages assessed against defendants in the sum of \$4,000, upon which verdict there was entered a judgment after the overruling by the court of motions for a new trial and in arrest of judgment, and defendants bring the record here for our review by appeal.

Defendants in their brief make the following statement as to what they contend the evidence pro and con tended to show, as to the happening of the accident.

As to the plaintiff that "plaintiff and Mrs. Liph, with whom she had been living at 1040 North Leavitt street which is just south of Division street, were on their way to make a call on the west side; * * * that they were waiting for the car on the northeast corner of Division and Leavitt streets and the car came up and stopped about sixty feet east of the crosswalk because of some automobiles which were standing on the tracks. * * * They walked to the rear end of the car and plaintiff and a gentleman boarded the car. * * * The car then started up in its usual way, leaving Mrs. Liph and plaintiff's other witnesses on the street. * * * Plaintiff was tendering her fare to the conductor when she noticed that Mrs. Liph was not on the car, and asked the conductor to stop. * * * The car came to a stop again at its regular stopping place and Mrs. Liph and plaintiff's other witnesses were following it for the evident purpose of boarding it. Plaintiff who had been up on the platform stepped down on the step and was in the act of alighting from the car when it

There was a brief delay while the jury was
receiving evidence of the fact that the
defendant in the case of 1911, was also
and entered a judgment with the finding of the
of action for a new trial and the trial was
therefore the court will not review the trial.

as to the necessity of the situation.

As to the possibility of a "split" in the party, I think it is very unlikely. The party is very small and the members are very loyal. I think the party will continue to grow and will be a very important part of the political life of the country.

started with a jerk and caused her to fall."

As to the defendant that "there were no automobiles ahead of the car and the car came right up to the east crosswalk and stopped at its usual stopping place. * * * The people waiting boarded the car and the car started up in the usual way, with no one else attempting to board it. * * * Plaintiff and Mrs. Liph came around the front end of the car just as it was about to start, and ran toward the rear. * * * After the car had started to move plaintiff succeeded in getting aboard, but Mrs. Liph did not. * * * When plaintiff saw that Mrs. Liph did not get on the car, she told the conductor to wait for her friend. * * * The conductor reached for the bell rope to give the signal to stop, whereupon plaintiff, who was on the step, stepped off of the car backwards and fell on her back. * * * The car was moving at the time she stepped off, but came to a stop in response to the conductor's signal after plaintiff had fallen. * * *

Defendants upon the record make thirty-eight assignments of error and in their brief argue for reversal:

1. That the verdict was against the manifest weight of the evidence;
2. The damages are excessive;
3. There was error in rulings on admission of evidence;
4. There was error in the giving of instructions.

As to the verdict being against the weight of the evidence, defendants argue that plaintiff's theory of the accident was supported by three witnesses, of which she was

started with a few and moved on to the...

in the... they... were...

... of the... and the... right...

... and stayed at the... during...

... during... the... and the...

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1. The... was... the...

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one, and that defendants' theory was supported by five witnesses, each of whom defendants insist was disinterested. However, it is a fact that one of defendants' witnesses was a motorman in their employ; another was the conductor since out of their employ; two were investigators in the employ of defendants, and that three of the defendants' witnesses were paid \$4.00 and others \$13 a day for their attendance in court as witnesses. It may be that in weighing the evidence and in passing upon the credibility and the fairness of some of defendants' witnesses the jury did not accord to it all of the high attributes claimed by counsel for it in their briefs. It was the province of the jury to pass not only upon the weight of the testimony of the respective witnesses, but also their credibility, and in so doing to take into consideration their appearance upon the witness stand, their bias or prejudice, or interest for any of the parties as such might be developed by the personal appearance of the witnesses, and to give to such testimony the weight to which, in their judgment, it was fairly entitled, - no more and no less, - that was their province and their duty under the law. As a court of review we are not permitted to disturb the jury's finding on the facts unless we are able to say from all the evidence that the verdict is manifestly against its preponderating force. Nor are we able to say that the verdict is not warranted by the believable evidence. A careful examination of all the evidence found in the record strongly inclines us to agree with the jury in its verdict. It is manifest that the crux of the situation is within quite a narrow compass, - that is, did plaintiff jump off the car while it was in motion or did she fall off the

one, and that testimony, though not supported by the evidence,
and of which testimony there was no evidence, was
it is a fact that one of the witnesses, who is a witness
in their capacity, and that the testimony was not at all
correct, but was incorrect in the matter of testimony, and
that some of the testimony, although not at all correct,
states in a way that testimony is wrong in testimony,
it may be that in making the witness and in making the
the testimony and the witness to some of testimony, and
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which is correct, it is in this witness. It was the
fact of the fact to know that the witness of the
testimony of the witness, but that testimony,
and in no way to take into consideration their testimony
and the witness, that fact of testimony, or testimony
for any of the witness or which may be supported by the
and testimony of the witness, and to find out which
may be correct in which, in their testimony, it was testimony
correct, - no more and no less, - that was their testimony and
their duty under the law. As a matter of fact, we are not
permitted to discuss the fact's finding in the fact's witness
to the fact in any way all the evidence that we believe is
correctly stated the testimony, and we are not
to say that the witness is not supported by the testimony
evidence. A correct testimony of all the evidence found
in the witness's testimony as to what the fact is
the witness. It is correct that the fact of the testimony
is correct and a correct testimony, - that is, the testimony
fact of the fact is not in evidence as to the fact of the

car by reason of its being started while in the act of alighting? There was evidence to support both theories. In this condition of the evidence it was for the jury to determine which of these theories they believed a preponderance of the evidence supported. With these conclusions in this regard we find no just reason to interfere. The questions of negligence and due care are of fact, exclusively the province of the jury to solve, within the limitations heretofore set out. The rule is, as well stated by Mr. Justice Brewer in Railroad Co. v. Powers, 149 U. S. 43, thus:

"It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fairminded men will honestly draw different conclusions."

This is but a concise statement of the law in this forum.

Gustavson v. Hester, 211 Ill. App. 439; Barnett v. Levy, 213 ibid. 129; Reidel v. C.R.I. & P. Ry. Co., 144 ibid. 424, affirmed in 239 Ill. 362; Campbell v. C.R.I. & P. Ry. Co., 243 ibid. 620; Quinnlivan v. Reedy & Callahan Coal Co., 202 Ill. App. 224.

It is in evidence on the part of plaintiff that before the accident she was earning \$50 a week; that by reason of her injuries, suffered as a result of the negligence attributable to defendants, she was unable to continue the employment from which she drew that income; that at the time of the happening of the accident plaintiff was 21 years old and in robust health; that in falling from the car she struck her head and became unconscious; that after regaining consciousness she fainted from severe pain; that the following morning she had

not completely regained consciousness, and for a week after she was in a more or less dazed condition from weakness and was confined to her bed for four weeks; her hair since the accident has turned from a dark brown to some gray; she suffered from severe headaches when she attempted to work or do any physical labor; she suffered from nervousness, dizziness and trembling of the hands, sufficiently severe to prevent her working. For six years after the accident she so suffered frequently confining her for times to her bed; that being unable to work, three years after the accident she started to attend the University of Wisconsin as a student, but she was unable to devote, on account of her physical and mental condition, more than three hours in any one day to her studies; at the time of the trial she was still receiving medical care, suffering from headaches and could not perform physical labor. Her medical attendant testified that plaintiff suffered from concussion of the brain; that he found a stiffness in her neck and head, also noticed in her a loss of weight, and that she was skinny, nervous and dizzy, and that her hair had become gray seven weeks after the accident. He further testified as to her impaired physical condition.

The only medical witness testifying was plaintiff's attending physician. His testimony was not contradicted by any other medical man or woman. He was the only professional testimony. He was the personal medical attendant of plaintiff from the time of the accident until the date of the trial. The attending physician had a right in forming his opinion as to his patient's condition, to take into consideration the statements made to him regarding her condition at the times when

not absolutely typical individuals, but for a very wide
 the use is made of the term "typical" in medicine and
 was confined to the fact that the cases are not at all
 peculiar but rather show a great degree of commonality.
 without any special features that are suggested by the
 or in the physical aspect, and without any abnormality,
 diseases and symptoms of the body, which are common to
 persons not working. The idea is that the condition is
 without any special features, but for a very wide
 being made to show, these cases are not at all
 stated to show the possibility of abnormality in a
 but the use of the term, as a means of not making any
 special conditions, with these cases is not at all
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 the fact that the cases are not at all typical.

The only medical condition which was described
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 abnormality was not at all in the fact that the condition was

he made a physical examination of her. Hekels v. Nuttschell, 230 Ill. 462; City v. McNally, 227 *ibid.* 14.

We find no procedural errors in the rulings of the court upon the evidence. We are likewise unable to say that the damages awarded are excessive for the serious injuries suffered by plaintiff as detailed by her attending physician, and which testimony was not contradicted by any countervailing proof. The trial judge did not err in denying the several motions of defendants to instruct the jury to return a verdict in their favor. At the time of the making of these several motions the evidence in the record did not present a question of law for the court, but of fact for the jury.

As to the instructions the court gave eight tendered by plaintiff and gave twenty-five instructions at the instance of defendants. A careful examination of these instructions does not reveal any reversible infirmity in any of them. It may be that the large number of instructions given at the instance of defendants may have had some confusing effect upon the jury, but there is nothing in them derogative of the rights of defendants under the law. It is patent that some of defendants' tendered instructions might have been refused considering the questions of law involved, and they might have all been adequately covered by a much less number of instructions than that given at the request of defendants. If there is any error in the instructions given, they were to the advantage of defendants. Defendants have no just cause of complaint on the court's rulings on instructions.

The record is free from reversible error and the judgment of the Circuit Court is affirmed.

WILSON AND TAYLOR, JJ. CONCUR.

AFFIRMED.

86 - 32683

250 I.A. 626

SAUL H. GRONER,

Appellee,

v.

JAMES J. CATSAROS AND JAMES
W. DARRAS,

Defendants,

On Appeal of JAMES W. DARRAS,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed October 3, 1928

MR. PRESIDING JUSTICE HOLDEN delivered the opinion
of the court.

This is an appeal by the defendant James W. Darras,
from an order making him a party to a judgment entered against
him, and James J. Catsaros, August 11, 1927, for the sum of
\$565 and costs.

On petition of defendant Darras, he was let in to
plead and defend, the judgment in the meantime to stand as secur-
ity.

Darras in his petition stated inter alia that the
judgment was predicated upon two promissory notes for \$280 each
etc; purported to be signed by Darras and his co-defendant James
J. Catsaros, etc; Darras states that he did not sign the notes,
either as maker or endorser (the notes being payable to the order
of the makers), neither did he authorize any one to sign or en-
dorse the two notes for him and that his name on said notes, both
as maker and indorser, are forgeries. The trial was before the
Court by agreement, with the resulting finding and order above
mentioned.

2501A 828

82 - 8282

State of New York

County of New York

ss.

I, the undersigned, Judge of the Court of Sessions for the County of New York, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears from the records of said Court.

Witness my hand and seal of office at New York, this 1st day of June, 1902.

Judge of the Court of Sessions for the County of New York

Attest:

Clerk of the Court of Sessions for the County of New York

By _____, Deputy Clerk of the Court of Sessions for the County of New York.

This is to certify that the within and foregoing is a true and correct copy of the original as the same appears from the records of said Court.

In testimony whereof, I have hereunto set my hand and seal of office at New York, this 1st day of June, 1902.

Judge of the Court of Sessions for the County of New York

Attest:

Clerk of the Court of Sessions for the County of New York

Defendant argues, principally, for reversal that the Court erred in forcing defendant to take the affirmative in making his proofs and to open and close the case and that ratification of a forged instrument will never be implied from a doubtful state of facts, and further that plaintiff did not make out his case by a preponderance of the evidence.

There is no doubt, from the relation of the parties, that plaintiff claimed that defendants were indebted to him in the sum of one thousand dollars for a real estate commission and that the notes in the record were claimed to have been given in part payment therefore. Catsaros does not dispute his execution of the notes and the endorsing of them.

It will be observed that the defense of Darras is forgery, viz: that his name as maker of the notes and endorser of them are forged, as we shall hereafter endeavor to demonstrate, this required proof by Darras of his criminal charge of forgery, beyond all reasonable doubt.

While it was error for the trial judge to require defendant to take the initiative in making his proof it was not reversible error. Plaintiff should have been required, in the order of proof, to take the initiative, before defendant was called upon to put in his defense. The record demonstrates that in making his proofs inversely, as required by the court, such proofs maintained his cause by a clear preponderance of the evidence, sufficient, without countervailing evidence, to entitle him to recover. This being so, what this court said in Merrie v. Taylor, 199 Ill. App. 586, is applicable here. In its opinion the court said:

There is no doubt that the release of the review
that directly related that information was intended to do in
the end of the document which is a very little information and
that the issue in the review was related to how was given in
the review of the review. However, there was a direct relation
of the review and the review of the review.

While it was never for the trial judge to render the
testament in this the initiative in making the point it was not
verifiable error. The initiative should have been provided, in the
order of events, to have the initiative, before testimony was
called upon to act in his defense. The second assumption that
is making his goods lawfully, as required by the court, and
goods maintained the word by a clear representation at the
evidence, without, without representing evidence, to make the
one to know. This being so, that there was no error in
evidence. The law, in evidence, in the evidence.

" The court required defendant to take the initiative and introduced his defense first before plaintiffs were put to their proofs. This was an error of procedure. When defendant was let in to plead, the case stood for trial upon the pleadings which cast upon the plaintiffs the burden of proving their case under the law in the same way they would have been compelled to do had there been no judgment entered by confession. However, this error, resulting in the case being tried in the inverse order of legal procedure, is of no importance and did not adversely affect the rights of defendant."

These remarks are equally pertinent to the instant case.

The trial judge did not find that the notes were forged, as contended by Darras' counsel. He used some loose language in comment but there is no finding anywhere in the record that the notes were forged. There is evidence in the record that Darras' name as maker and endorser on the notes is his signature.

It appears that the transaction out of which the giving of the notes in suit arose, occurred in the office of a Mr. Tinley - that some check and notes were given to a Miss Palmer in the Tinley office - upon examination, among other things, Miss Palmer found that a certain check was post-dated sixty days and that the certain notes were signed by Darras only, with some unacceptable conditions. Thereupon it was agreed that if Catsoras would execute judgment notes and have them signed by Darras, that Tinley would give him five hundred dollars. The notes were made out and given to Catsoras who took them away and returned them to Tinley signed by himself and bearing the signature of defendant Darras. Upon the faith and credit of these notes being signed by both Catsoras and Darras, the former was given \$500.00 according to agreement. Before handing the check to Catsoras, Miss Palmer testified that she called Darras by telephone and asked him if he had signed the notes, being the

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That letter, now in my possession, is the only one of the kind that I have seen. It is written in ink on a piece of paper which is now yellowed with age. The handwriting is in a cursive script, and the ink is somewhat faded. The letter is addressed to a person whose name is not legible, but who is presumably a friend or acquaintance of the writer. The letter is dated "New York, 1864", and contains several lines of text, some of which are illegible due to fading and the condition of the paper. The letter is signed "Yours truly, Wm. L. G." and is enclosed in a simple paper envelope.

[illegible][illegible]

notes in suit, and he answered "Yes", about a week thereafter both Oatsoras and Darras went to the Tinley office and Miss Palmer asked Darras if he would pay the notes when due and he responded with these words, "What I sign, I pay". If he intended to deny that he signed the notes, that was the time for him to make the denial, not by tacitly admitting that he had signed the notes by saying, "What I sign, I pay". Taking the situation as it then was, his conduct and his answer to Miss Palmer's question was by interpretation an admission by him that he signed the notes. Such conduct amounted to a ratification of his signature. This was as much a ratification by Darras of the genuineness of his signature as in Hefner v. Dawson, 63 Ill. 403; where in answer to a question, the defendant, the assumed maker of the note, said in effect that it "was all right". We think defendant by his acts and conduct is estopped from denying his signature to the notes. To the like effect is Hefner v. Vandolah, 62 *ibid.* 483.

While it is true Darras not only denies that he signed the note, but also denies Miss Palmer's testimony as to conversations with him, hereinbefore referred to, suffice it to say that in this regard Miss Palmer was corroborated in all substantial particulars by Tinley, and Miss Osmer.

The trial judge by overruling defendant's motion for a new trial and in giving judgment on his findings, in effect held that Darras signed the notes and the endorsement thereon, that his name was not forged to these notes, and that they were his legal obligations and that plaintiff had sustained his case by a preponderance of the evidence and that he believed the testimony of plaintiff, Palmer, Tinley and Miss Osmer, and that he did not believe the testimony of Darras and his witnesses, where the same

conflicted with that of plaintiff and his supporting witnesses. The trial judge saw the witnesses, and from their manner of testifying and their appearance and conduct upon the witness stand, was better able, than are we, to judge of the credibility of the witnesses and from a careful study of the proofs found in the record, we see no just reason for disturbing the conclusions of the trial judge. As indicated in the early part of this opinion, the defense interposed by Darras, was an affirmative one and as it charged a crime both at common law and under the Illinois Criminal Code, in order for such defense to prevail it must be sustained by that weight of testimony sustaining such defense beyond all reasonable doubt, a preponderance of the evidence is not sufficient. However, Darras had neither the one or the other.

To sustain the foregoing dicta we cite Hendricks Admr. v. Chicago Rapid Transit Company, Case Gen. No. 33067, handed down Feb. 23, 1938, and not yet reported. As there said; discussing a plea charging a crime:

" This is an affirmative issue which casts upon defendant the burden of proving the alleged crime by evidence sufficient to convince a jury that deceased was guilty of such attempted crime beyond all reasonable doubt. A preponderance of evidence on this phase of the case is not sufficient to meet legal requirement. In Rost v. Noble & Co., 316 Ill. 357, the court said inter alia:

***** the case is founded upon a criminal offense which is charged in the pleadings and must be established by the evidence to maintain the cause of action, and that the measure of evidence required in Illinois when a criminal offense is charged in the pleadings and must be shown to establish the cause of

[illegible]

It is noted in the foregoing that the above information was obtained from the files of the Bureau of the Federal Bureau of Investigation, and that the same was obtained from the files of the Bureau of the Federal Bureau of Investigation, and that the same was obtained from the files of the Bureau of the Federal Bureau of Investigation.

1. This is an affidavit made by me, the undersigned, a Justice of the Peace for the County of [] State of [] to the effect that I have read the foregoing statement of [] and I believe the contents thereof to be true and correct.

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action or defense is such as removes every reasonable doubt of guilt. This rule, which has prevailed from very early in the history of the State, has been consistently adhered to and frequently announced, except in actions of slander or libel, in which it is provided by chapter 126 of the Revised Statutes of 1874 that it shall be competent for the defendant to establish the truth of the matter charged by a preponderance of the testimony. (Crandall v. Dawson, 1 Gila. 556; Serling v. Bank, 14 Ill. 46; McConnell v. Delaware Mutual Safety Ins. Co. 18 id. 228; Harbison v. Shook, 41 id. 141; Sprague v. Dodge, 48 id. 142; Germania Fire Ins. Co. v. Klever, 129 id. 599; Grimes v. Hilliary, 150 id. 141; People v. Sullivan, 218 id. 419; McInturff v. Insurance Co. of North America, 248 id. 93; Oliver v. Ross, 289 id. 824)."

There is no error in the record here reviewed to justify this Court in reversing the judgment of the Municipal Court and it is therefore affirmed.

AFFIRMED.

WILSON AND TAYLOR, JJ. CONCUR.

250 T.A. 626³

32695

AMY C. FANKER,

Appellant,

v.

G. FRANK CROISSANT and
UNION BANK OF CHICAGO,
a corporation,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

Opinion filed October 3, 1928

MR. PRESIDING JUSTICE HOLDOM delivered the opinion of the court.

This bill, filed by complainant, sought a rescission and cancellation of a real estate contract for the purchase of a certain lot in Palisades Addition to the Calumet District of Chicago, and asked that the money paid thereunder be returned to her. The gravamen of the charge in the bill was founded on the alleged fraud in inducing complainant to enter into the contract on the false and fraudulent representations of the agent negotiating the contract, which induced her to part with her money and sign the contract of purchase of the lot, and that she did sign the contract and did part with her money in reliance upon the alleged false and fraudulent statements of defendants. The defendant, Union Bank of Chicago, was trustee for the defendant, G. Frank Croissant. The agents of defendants told complainant that within 90 days street cars would be running down Burnham Avenue; that if she wanted to sell her lot they would be glad to sell it for her, and that fifty houses and a

hotel would be put up in the neighborhood; that said agents guaranteed that complainant would profit \$100 by March 1, 1926, and that it was stated that the elevated railroad would be extended, and also street cars, and that any one could see the poles there for the extension, "there" meaning in the vicinity of the subdivision.

Defendants answered the bill denying all the alleged representations of a fraudulent character, as charged in the bill, inducing complainant to sign the contract and part with her money. Defendants claimed in their answer, as a defense, that all representations, agreements, terms and conditions of purchase by complainant were merged in the written agreement, and that none of such representations are found in the contract. There is no mention in said contract for resale or guaranty of a profit, or anything about the erection of fifty houses or ten or fifteen stores in Palisades Addition, and that the contract being in writing, executed by the parties thereto, all contemporaneous representations are merged in the contract, and that complainant was bound thereby.

There was a trial before the chancellor, and the complainant put in her evidence, which as to the representations alleged in the bill was substantially sustained by such evidence; at the conclusion of complainant's evidence solicitors for defendants moved the court to strike out all of complainant's evidence and to enter a decree dismissing the bill for want of equity, which the court did, and from which complainant prosecutes this appeal.

The following provisions are found in the contract:

[illegible]

There was a third person who was present, and who was identified by the witness as being the person who was present at the time of the shooting. The witness also stated that the person who was present at the time of the shooting was the person who was present at the time of the shooting.

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"This contract is for the sale of vacant property only, and vendor is hereby in no manner obligated to resell above described property for purchaser."

"The undersigned has read and understands the whole of the above contract and now states, and in consideration of the contract agrees, that no representation, promise or agreement not expressed in the contract has been made to induce the undersigned to enter into it."

It is clear that the representations alleged in the bill, made to induce complainant to enter into the contract and pay for the lot (if such were made) were of matters to occur in the future and not of a claimed existing fact. It is axiomatic that all representations made regarding any matter, subject to a written contract, are of no binding force, unless found in the contract executed by the parties, and in the case at bar nothing of the kind appears in the contract. There is no evidence that any false or fraudulent representations were made to the complainant to induce her to sign the contract without informing herself of its several clauses and provisions, or that any attempt was made to induce her to sign the contract without reading the same. The law will presume that complainant before signing the same informed herself of its contents, and furthermore there is an express provision in the contract reciting that complainant both read and understood the contract and its contents, and "that no representations, promise or agreement not expressed in the contract has been made to induce the undersigned (complainant) to enter into it". Likewise there is another clause stating that the vendor was in no manner obligated to resell the property for the purchaser. Day v. Fort Scott Investment Co., 153 Ill. 293, holds that a representation of something which is to take place in the future is not a representation of fact which, if false,

[illegible][illegible]

will justify a rescission of the contract. Furthermore complainant made no attempt to rescind the contract and restore the status quo. Such would be a necessary precedent condition to entitle complainant to rescind the contract in any circumstances.

In Greenwood v. Fenn, 136 Ill. 146, the court laid down the rule thus:

"The rule on this subject is well stated in Grymes v. Sanders, 93 U. S. 55, as follows: 'Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objections, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted.'

In the Day case, supra, the court quoting from the opinion of this court (53 Ill. App. 165) said:

"It will be noticed that the representations charged to have been false and fraudulent referred to no existing facts, but merely amounted to promises as to something to be done in the future. As was said in Gage v. Lewis, 68 Ill. 604: 'Even if, at the time they were made, it was not intended to comply with them, it was but an unexecuted intention, which has never been held, of itself, to constitute fraud. As distinguished from the false representation of a fact, the false representation of a matter of intention not amounting to a matter of fact, though it may have influenced a transaction, is not a fraud in law.' (Kerr on Fraud and Mistake, 88). So it is said in Sigelow on Metoppel 481: 'The representations or concealment must also, in all ordinary cases, have reference to a present or past state of things, for if a party make a representation concerning something in the future, it must generally be a statement of intention or opinion undertaken to the knowledge of both parties, or it will come to a contract, with the peculiar consequence of a contract.' In Womersley's Ec. Jur. sec. 877, it is said: 'A statement of intention, merely, cannot be a misrepresentation amounting to fraud, since such a statement is not the affirmation of an external fact, but is, at most, only an assertion that a present mental condition or opinion exists.' Such is no doubt the general rule."

This seems to be a case of damnum absque injuria (loss for which the law provides no remedy), for complainant when interrogated regarding any damages which she suffered, said: "I don't know whether the lot is worth more or less than I contracted to pay for it". Taking her at her own word, there is no evidence that she suffered any damage by reason of any of the representations made to her by the agents of defendants at the time she executed the contract of purchase, whether false or true, and therefore from her own statement, above quoted, we must hold that it is not in evidence that she suffered any damage or loss by entering into the contract because of any alleged false statement or representation made to her at the time of negotiating the sale of the lot.

For the foregoing reasons the decree of the Circuit Court is affirmed.

AFFIRMED.

TAYLOR AND WILSON, JJ., CONCUR.

This system is in a state of constant change.

(From the time the law passed in 1907, the Commission

when investigating reported and compared with the statistics

and it is not a new system. The law is still in force and the law

I considered as the law in 1907, which was not the case, there

is no evidence that the system was changed by reason of any of

the recommendations made to the Board of Directors at

the time the system was changed in 1907, which is the

on time, and therefore there is no evidence that the system

was changed in 1907. It is not in evidence that the system was

changed at any time by reason of the recommendations made to the

Board. (The statement of the Commission made in 1907 is the

time of the investigation and the law is still in force.)

The law regarding the system of the Board

is still in force.

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RECEIVED THE BOARD OF DIRECTORS

PAULINE PORTER WHITE,

Appellant,

v.

ELLA JOYCE WHITE, et al., etc.

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed October 3, 1928

MR. PRESIDING JUSTICE HOLDOM delivered the opinion of the court.

Defendants have not followed this appeal.

Complainant filed her bill "to correct mutual mistake cancelling securities."

The defendant Ella Joyce White interposed to said bill a special and general demurrer. By the special demurrer the following special causes of demurrer were assigned:

1. That the complainant does not in her said bill of complaint allege any fact which would warrant the relief sought by said bill against the defendant, Ella Joyce White.
2. That the complainant in her said bill of complaint alleges facts which shows her claim if any, to be against Mark White, one of the defendants, personally, and not against the defendant, Ella Joyce White.
3. That the complainant has an adequate remedy at law against the defendant, Mark White.

Complainant moved to strike the demurrer as frivolous and for a decree as by default in accord with the prayer of the bill. These motions were overruled and complainant electing to stand by her bill the same was dismissed for want of equity, and complainant brings the record here for our review by appeal.

In this condition of the record there is presented for our review and determination, whether or not, the bill of complainant upon its face states a case entitling her to the relief prayed against Ella Joyce White.

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Mark White, one of the defendants, is the husband of complainant. Complainant avers in her bill, inter alia, that on June 17, 1930, her husband executed a purchase money mortgage upon certain described real estate in Chicago. That the indebtedness secured was evidenced by twenty promissory notes for \$7,500, principal due within three years, payable to himself and by him endorsed in blank and delivered to the vendors of the mortgaged land by the maker. The so-called mortgage securing the notes above mentioned, was evidenced by a trust deed conveying to the Chicago Title & Trust Company, as Trustee, the premises above firstly referred to. That complainant paid \$6,300 of her own money for three of said notes, describing them, which she duly received and which notes were by mutual mistake marked paid or cancelled without the knowledge of defendant, Ella Joyce White, and that "by mutual mistake the security for the same was cancelled and returned of record without knowledge of defendant (Ella Joyce White), whereby said cancellations your oratrix (complainant) is left without land security for her money as was mutually intended by herself (complainant) and defendant, Mark White, and would have been done if the Joyce (defendant Ella Joyce White) claim did not intervene as alleged." By the averments of the bill it clearly appears that the mistakes were those of complainant and her husband Mark, and in no way any mistake of defendant Ella Joyce White. Neither is there any averment that Ella Joyce White did or assented to do any act or made any representations which misled complainant or her husband, or led them into the mistake or error about which complainant complains. There is no averment of any "mutual mistake" between complainant or her husband, Mark, and the defendant Ella Joyce White. Complainant further in her bill avers:

"That said promissory notes of Mark White for \$6,300.00 were delivered to your oratrix after cancellation December 29, 1922, by mistake, but nevertheless, as his wife, she rested in the belief that she had land security for her money because of his inability to convey good title without her signature to the deed."

We are unable to discover any averment of "mutual mistake" at any time arising under the averments of the bill between complainant and defendant Ella Joyce White. If any mistake, mutual or otherwise, is inferable from the averments of the bill, they involve complainant and her husband, and no one else.

We are at a loss to understand how the Chancellor could have done otherwise than he did in dismissing complainant's bill for want of equity.

The decree of the Circuit Court, so doing, is affirmed.

DECREE AFFIRMED.

WILSON AND TAYLOR, JJ., CONCUR.

THEY WERE NOT IN THE AREA OF THE CRIME.

Figure 2 is a schematic diagram of a typical system.

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10. The following are the names of the persons who have been appointed to the various committees of the Board of Directors:

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14. Journal of the American Statistical Association, 94 (1999), 1039-1044.

...and the

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doi:10.1017/S002229240000209

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1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

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MAXIMILIAN ST. GEORGE,

Appellee,

v.

LOUIS NAROWETZ, et al.

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

Opinion filed October 3, 1928

MR. PRESIDING JUSTICE HOLCOM delivered the opinion of the court.

This is an action of libel. In his declaration plaintiff, among other things, charges that the defendants being members of the Stockholders & Policyholders Protective Committee of the Public Life Insurance Company of Chicago, did on December 15, 1925, publish and circulate among the stockholders of the Public Life Insurance Company, 5000 in number, a letter containing false, etc., libelous matter of and concerning the plaintiff, which defendants have abstracted in their abstract filed herein on this appeal in the following words:

"STOCKHOLDERS AND POLICYHOLDERS PROTECTIVE COMMITTEE OF THE PUBLIC LIFE INSURANCE COMPANY,

CHICAGO, ILLINOIS

December 15, 1925.

Louis Narowetz
Fred M. Welsh
Dr. Curtis A. Haines
A. L. Linder
Dr. William F. Schaare
William M. Ulirich
William D. Herwig
Rudolph A. Henson
David M. Haines
C. A. Willard
Charles J. Gottschalk
Carl W. Johnson
Fred C. Mueller
Louis L. Narowetz, Jr.

Grandson Jaeger
Herman Schultz
George E. Frey
G. W. Dittman
F. M. Borm
John A. Anderson
Dr. E. M. Arnold
John M. Enklund
Victor H. Bernay
C. H. Gilson
O. B. Balch
Andrew Brindley
William E. Baker

WHEN THE POT (MEANING THE PLAINTIFF, A PERSON
OF A DARK REPUTATION, A BLACKGUARD) CALLED
THE KETTLE (MEANING ALFRED CLOVER A PERSON
OF A DARK REPUTATION, A BLACKGUARD) BLACK.
WHAT ST. GEORGE SAID ABOUT CLOVER.

August 6, 1923.

St. George wrote the stockholders:

'Mr. St. George was made General Manager in the place of Alfred Clover.' * * * The Directors found it necessary to make this change in order to save your company from great loss, if not from bankruptcy itself. * * * No one can say that Mr. Clover did not have the fullest confidence and strongest cooperation of practically all the stockholders and directors. He himself told you all that five years ago he did not possess a "thin dime". He himself also tells you how wealthy he is, how much better off than others. And where did all this wealth come from if not from the Public Life? He always talked about sincerity and loyalty. Why can he not now practice his preachings? Why should he not be loyal to the majority of the Directors - to the Company - he who got so much wealth and honors therefrom? But No! Mr. Clover and a few of his side, have been, and are, doing all in their power to make the new management appear ridiculous, incompetent, etc. Instead of giving the help which any loyal worker of the Public Life would give they are trying to injure the company. They are telling the stockholders all kinds of silly stories, particularly the large stockholders - the members of the Advisory Board - that things are going to wreck and ruin. Instead of planning for new business, they are scheming day and night how to come back, to feed at the trough of the Public Life. At practically all of his meetings on La Salle street or 3908 South State Street he does not discuss insurance. He can only villify and abuse Mr. St. George and the Committee. Mr. Clover knows what harm this is causing. There is no excuse for it. How can the agents, the workers of this Company, be expected to labor with any heart, with any enthusiasm - in fact, write business at all - when the former head, the self-accredited founder of this company - villifies it, condemns it, abuses it ***? ***? The question for you to decide, therefore, is to whom will you give your confidence and support - to a man who has shown that he has no idea of business, who is more changeable than the wind, an egotistical autocrat * * * to Clover who stands for himself, or to the Directors who represent you. The Directors have given Mr. Clover every chance in the world. He has replied by trying to disrupt your organization. The time for compromise, for delay has passed. There can be no two ways about it - it is either Clover or the Public Life; disaster or success.'

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WHAT CLOVER SAID ABOUT ST. GEORGE

(Meaning the Plaintiff)

in Clover's Public Bulletin of February, 1925.

Vol. 1, No. 1.

'The Saint (Meaning the Plaintiff) Absconds.

*** Now it happens that the former man (Meaning the Plaintiff) that they had appointed as General Manager of the Company, Max St. George who has been acting as such from February, 1923, to the 20th of August, 1924, when he (meaning the plaintiff), absconded (meaning that the plaintiff secretly left with the funds of the said Public Life Insurance Company, funds in his possession, that the plaintiff embezzled funds and left secretly) to parts unknown, we might say that since that time we have information that leads us to believe that he (meaning the plaintiff) made his famous trip to Italy and Poland which we prophesied in our paper of the 5th of March, 1923. This fellow (meaning the plaintiff) had intended to skip out to Italy and leave things flat (meaning that the plaintiff abandoned his post or office). This prophecy did come true. He did leave his Board of Directors flat and while he (meaning the plaintiff) was away, at a special meeting, they cancelled his (meaning the plaintiff) contract and fired him (meaning the plaintiff) head over heels out. Reference to the minutes of the Board of Directors of the Company will verify this statement.'

Is it not significant that Clover prophesied in March, 1923, that St. George (meaning the plaintiff) would 'skip out,' (meaning that the plaintiff left under suspicious or criminal circumstances) that he (meaning the plaintiff) did leave unceremoniously; that later he (meaning the plaintiff) sold his stock to Clover and thereafter openly allied himself with Clover and is NOW ACTING AS CLOVER'S CHIEF LAYMAN?

Clover paid St. George \$1,600 August 5, 1925, on a voucher and bill reading as follows:

'To balance of wages as General Manager as per contract for the months of September and October, 1924, at \$200 per week.'

St. George's contract with the company provided for the payment of a salary of \$200 weekly and was cancelled for cause August 30, 1924, (meaning that plaintiff's contract was cancelled because of misconduct of plaintiff) yet Clover, without action by the Board of Directors (at least the minutes do not show any) paid his (meaning the plaintiff) salary from the date his (meaning the plaintiff) salary was stopped by the old board of directors, to the end of the contract period.

You will observe that Clover says of St. George he absconded (meaning that the plaintiff secretly left with the funds of the said Public Life Insurance Company, funds

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It is to be understood that the above information is for your information only and is not to be used for any other purpose. The information is being provided to you for your information only and is not to be used for any other purpose. The information is being provided to you for your information only and is not to be used for any other purpose.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

1. The following information is being furnished to you for your information only. It is not intended to be used for any other purpose.

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THE BUREAU OF THE ARMY AND NAVY DEPARTMENT HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF YOUR LETTER OF THE 10TH INSTANT, AND TO INFORM YOU THAT THE MATTER IS BEING CONSIDERED BY THE APPROPRIATE OFFICIALS.

in his possession, that the plaintiff embezzled funds and left secretly) and also that he (meaning the plaintiff) left the board of directors flat, and yet he (Clover) signs a check in August, 1925, paying him (St. George) \$1,600 for salary for September and October, 1924. What do you think of it?

Why did Clover pay this Judas (meaning the plaintiff that he is a person without honor, or a betrayer, one who would betray anyone for money like Judas betrayed Christ) this wolf (meaning the plaintiff, a person hungry for goods of others and going along under false appearance) in sheep's clothing the \$1,600 out of your money?

Yet the Pot (meaning the plaintiff a person of poor repute, black reputation) calls the KETTLE (meaning Alfred Clover a person of poor repute, black reputation) black.

DO YOU WANT THESE MEN (meaning the plaintiff and said Alfred Clover) TO RUN YOUR COMPANY? They (meaning the plaintiff and said Alfred Clover) have the effrontery to ask stockholders to sign their proxies. They (meaning the plaintiff and said Alfred Clover) are again conducting a campaign intended to mislead and deceive you. Their (meaning the plaintiff and said Alfred Clover) slogan is 'We (meaning the plaintiff and said Alfred Clover) want your proxy to vote at the February election, no matter how we (meaning the plaintiff and said Alfred Clover) get it.' Take our advice and refuse to sign a proxy for anyone until you have all the facts. You will have them very soon.

The auditors of Ernst & Ernst, Public accountants, are at work on the books of the Company, and while the audit is not complete, they inform us that all of the real estate owned by the company, including the Home Office building and the branch office building on State Street, were SOLD FOR TAXES IN SEPTEMBER, 1925. It will require about \$9,000 to redeem same; that there are death claims unpaid amounting to over \$30,000, some of them having been filed with the company as far back as last January; that operating accounts payable have accumulated during the same period and remain unpaid amounting to more than \$21,000, in addition to a large amount of unpaid loans on policies and surrenders; that the bank accounts of the company had been reduced to approximately \$3,000. The information secured from the auditors indicates that \$16,329.76 was paid to a number of attorneys employed by Mr. Clover and his associates, for legal fees, without proper vouchers showing what the money was paid for, it being quite evident, however, that it was used largely for the purpose of keeping them in control of your company.

Other items amounting to \$12,583.01 was paid to various persons for apparently the same purpose.

The company paid also, according to the records, over \$40,000 to Clover's Public Agency Company without proper vouchers showing what the money was paid for.

As soon as the audit is completed we will inform you so that you may see for yourself what disposition has

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The second half of the century is the twentieth.

UNITED STATES GOVERNMENT PRINTING OFFICE: 1964

been made of your money.

Yours very truly,

LOUIS NAROWETZ,
Chairman of Committee.

Fred H. Welsch,
Secretary of Committee."

In conclusion plaintiff charges that by means of the premises he has been and is greatly injured in his good name and reputation as an attorney at law, etc., and brought into public scandal and disgrace and has suffered a loss in the practice of his profession and has lost the confidence and esteem in particular of the 5,000 stockholders of the Public Life Insurance Company, and of the diverse friends and acquaintances of said 5,000 stockholders, and that on account thereof at the meeting of February 1936 was not elected a director or appointed general counsel for said Insurance Company and has been and otherwise is greatly injured and damaged in his person, good name and credit in his practice as an attorney at law to his damage in the sum of a quarter of a million dollars.

To this declaration the defendants pleaded the general issue and no other plea.

During the trial plaintiff dismissed the suit as to five of the defendants and the cause was tried against the remaining defendants. A jury was impaneled to try the cause and there was a verdict of guilty with damages assessed at the sum of \$2500, which after overruling defendants' motions for a new trial and in arrest of judgment the court entered judgment and defendants bring the record here by appeal for review and assign and argue for reversal that:

1. The communication in question was privileged.
2. That the question of the communication was one

1900

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continued by Abbott

1910

It is requested that you advise the Bureau of the results of your investigation.

To give consideration to defendant's proposed fine.

JAMES M. HARRIS

For several days

1. *Agave americana* L.

two, and will not change with the population size. And

of law for the court.

3. That the communication was made in good faith, and that the court should have instructed a verdict for defendants.

4. That the communication being privileged there can be no recovery without clear proof of actual or express malice.

5. That an attorney who has represented a client in a certain matter is disqualified to represent any other party adversely interested in the same subject matter.

1. The plea of the general issue did not put in issue the truth of the libel. Some of the charges made in the offending communications by the defendants to the 5000 policy holders of the Insurance Company were libelous per se, such as the charge that plaintiff had absconded to parts unknown and "why did Clover pay this Judas (plaintiff), the wolf in sheep's clothing \$1,600, out of your money? Yes, the pot calls the Kettle black." The libelous charges made to the stockholders were in no sense privileged. They were malicious and made for the malign purpose of preventing the plaintiff from being elected a director of the insurance company and appointed General Manager of the company at the ensuing February election, offices which he had theretofore held. Furthermore malice is inferred where the words of the alleged libel are libelous per se.

2. Concerning the correctness of the contention of defendants that the question of privilege was one of law for the decision of the court, it is a sufficient corrective to say that the court in overruling defendants' motions for a new trial and in entering a judgment on the verdict, impliedly

• *Artemia salina* - salt water shrimp

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DATE 10-10-2001 BY 60322 UCBAW

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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3. During the execution of the contract, the contractor shall be responsible for the payment of the contract price and the cost of the contract.

at least, found that the communication was not privileged. The jury by their verdict had so found and the court by overruling the motion for a new trial had impliedly concurred in such finding.

3. In the light of the contrariety of evidence in the record, it was clearly the province of the jury, under applicable instructions, to determine whether the offending communication claimed to be libelous was published and circulated in good faith. The evidence on this subject did not present a question of law for the determination of the court, but a question of fact for solution by the jury. For the trial judge to have instructed the jury to find a verdict in this condition of the proofs would have been a usurpation of the functions of the jury and constitute reversible error.

4. To the contention that the so-called libelous communication was privileged without clear proof in the record of actual or express malice on the part of defendants in causing its publication, it is a sufficient answer to reiterate that as the offending words were libelous per se malice as a matter of law will be inferred. Moreover, the jury might reasonably conclude from the proofs that the publication was made with malign intent as a matter of fact, regardless of the fact as a question of law, that malice under the pleadings was inferable without proof of express malice. As above related there are words in the communication which are libelous per se from which as a matter of law malice will be inferred.

5. The plaintiff in this case never represented professionally at any time any of the defendants in this suit. At no time did the relation of lawyer and client exist between

1. The first of these is the fact that the
-many of them are in the hands of the
of the Government and are not in the hands of
the public.

[illegible]

It is the opinion of the committee that the information furnished by the witnesses is reliable and that the facts stated are true. The committee is of the opinion that the information furnished by the witnesses is reliable and that the facts stated are true. The committee is of the opinion that the information furnished by the witnesses is reliable and that the facts stated are true.

At the beginning of the year 1950, the Government of the United States of America, through the Department of State, requested the Government of the United Kingdom to provide information regarding the activities of the Communist Party of Great Britain (CPGB) and its affiliates in the United Kingdom and its colonies. The Government of the United Kingdom has provided this information in accordance with the request.

plaintiff or any of the defendants in this suit. If the Insurance Company was a party defendant here, a different doctrine would prevail, and the decision on this point raised by defendants would make the case cited of People v. Gerold, 265 Ill. 448, applicable. However, on the facts in this case plaintiff never having been the legal representative of any of the defendants, at any time, the Gerold case, supra, is not in point.

The libelous communication, the gravamen of this action being set out in the introductory part of this opinion, fairly discloses the relationship of the parties to each other and of the Public Life Insurance Company. From that it appears that an election for directors, etc., had been called, and the article was sent to all of the stockholders for the purpose of influencing them not to vote for the plaintiff. The intent of malice appears strikingly from that document. He was charged with having absconded from the City of Chicago with an inference that he had decamped with some of the Insurance Company's funds. He was referred to as a "Blackguard" and as a "Judas", "a wolf in sheep's clothing", all of which defendants knew or are chargeable with knowing was not true. The article was sent to 5,000 of the Insurance Company's stockholders, a rather wide circulation. This acrimonious article resulted from two factions contending for the control of the company, - one was Marovetz and the other as the Glover. It was in an attempt to oust plaintiff as a controlling factor in the company that the article above set forth was mailed to the stockholders. It was in an attempt to injure plaintiff that the article was circulated. While it would have been perfectly ethical in a proper manner for defendants or others to interest themselves against the return of plaintiff to office in the Company, they

had no right to attempt his defeat by circulating the libelous and unfounded charges against him, of which he complains in this action.

The defendants were in touch with the doings of the Insurance Company and as a committee endeavoring to regulate its affairs will be presumed to have had notice of the fact that in the absence of plaintiff at a meeting of the Board of Directors the contract between the company and plaintiff was cancelled and the following resolution of appreciation and commendation passed at such meeting, viz.,

"Resolved that a unanimous vote of thanks and appreciation be given Mr. St. George (Plaintiff) by the officials and directors of this corporation for his unceasing and untiring effort in protecting and safeguarding the interests of the corporation, and for the valiant effort he has made to protect the interest and welfare of the Public Life Insurance Company."

This, as can well be seen, is no faint praise and appreciation of plaintiff's service. In the teeth of this, the defendants published the scurrilously libelous article set out in the plaintiff's declaration and hereinabove set out. Opportunity was given defendants to retract but they refused to avail thereof. It is patent, beyond all peradventure, that the article was the offspring of malice and so issued with premeditation, and for the main purpose of injuring plaintiff both professionally and personally. Its issuing can only be accounted for upon the theory of express malice. Such malice, that when requested to retract the article, met with refusal which refusal is an additional evidence of the malice which originally inspired its issue.

About the only reasonable defense interposed lies in the defendants' attempt to repudiate the whole transaction. We

find in the record, however, abundant evidence that the article was issued and circulated by the authority of the defendants. These defendants were a part of the stockholders committee appointed and acting as such and that from the evidence they are chargeable with knowledge of the issuing and circulating of the defamatory article set forth in the declaration, which article was signed in behalf of the committee whose names appeared in the heading of the article which was signed by "Louis Narowetz as Chairman of the Committee" and "Fred H. Welsch, Secretary of the Committee." None of the defendants ever made any attempt to repudiate the article prior to the commencement of this action. We think from the evidence that the article was issued and circulated by the chairman and secretary of the committee, and that in so doing they were acting within the scope of their authority as agents of defendants, and that they are bound thereby. Miss Jenny Surdan, a clerk for the committee, testified inter alia, "I saw this letter written (referring to the libelous article). Mr. Burke composed it. I saw it dictated. Mr. Burke dictated it. *** After it was written it was submitted to the committee first but it was submitted both to Mr. Rodriguez and Judge Smith and to the members of the Committee, ** the letter was submitted to the lawyers because every letter Mr. Burke ever wrote or composed was always submitted to the lawyers" - and much more evidence to a like effect is found in the record.

To the contention that the judgment is not supported by the evidence we cannot agree. Joint tortfeasors may be sued separately or together. Unlike a contract debt where there must be a recovery against all or none, in a tort case such as the instant case, recovery may be had singly or against any

number less than all. Some may be found guilty and others not guilty. In this regard the judgment against the defendants conforms to legal precedent.

The opinion of this court in cause No. 23500, in which plaintiff was not a party, was offered in evidence by defendants over the objection of plaintiff. This should not have been received. However, as the error is of defendants' own creation they cannot be heard to complain in this court. Defendants complain about the court's instructions to the jury. Instruction 14, given at the request of defendant, was erroneous, but defendants cannot advantage of the other error of their own creation. Plaintiff might, but does not seek so to do.

We have carefully examined the instructions as a whole and find nothing in them affecting the rights of the defendants to their prejudice. The cause was fairly tried, the jury substantially correctly instructed upon the law applicable to the facts in evidence. We find no procedural errors and are of the opinion that the verdict and judgment find support in the proofs and that the award of damages is most reasonable.

For the foregoing reasons the judgment of the Superior Court is affirmed.

AFFIRMED.

WILSON AND TAYLOR, JJ. CONCUR.

under law then all. I am not a lawyer and I do not
believe in this respect the judgment of the court is
more in legal matters.

The opinion of the court is that the
other plaintiff was not a party, and without its
admission over the objection of the defendant. This should not have
been necessary. However, as the trial is of defendant's
motion that should be held as decided in this court.
Defendant complains about the court's instructions to the jury.
Instruction 11, given as the court of defendant, was erroneous,
but defendant cannot complain of the error of their own
counsel. Plaintiff object, but that was not in the

in fact actually received the instruction as it
which was then received in fact affecting the rights of the
defendant as they appeared. The court was fairly tried, the
jury intelligently and fairly instructed upon the law applicable
to the facts in evidence. It is not a technical error and the
of the opinion that the verdict and judgment was correct in the
opinion and that the court of law is not reversible.

For the foregoing reasons the judgment of the court
is affirmed.

WITNESSES,

WILLIAM H. HARRIS, II, CLERK.

250 LA. 627²

116 - 32713

WILLIAM LEWIS,

Appellee,

v.

JACOB SHERMAN AND NORMAN A.
GOLDBERG, trading as S.
SHERMAN,

Appellants.

APPEAL FROM

MUNICIPAL COURT,

OF CHICAGO.

Opinion filed October 3, 1928

MR. PRESIDING JUSTICE HOLSON delivered the opinion
of the court.

The plaintiff has failed to follow this appeal. The claim of plaintiff for which he brought this suit, to recover, was for merchandise sold to defendants doing business as "S. Sherman", amounting to \$635.41. The liability of defendants was alleged to be joint.

Summons in due course was issued against both defendants and served on Sherman, January 10, 1927, and returned not served as to defendant Goldberg. Sherman was defaulted for want of appearance or plea, January 26, 1927, and a judgment taken against him for the amount of the claim \$635.41. Thereafter, on February 4, 1927, an alias summons was issued against Goldberg and served upon him February 10, 1927, and on February 18, 1927, Goldberg entered his appearance in writing and followed that up by filing his affidavit of meritorious defense. In this affidavit Goldberg denied joint liability with Sherman for the claim. On December 6, 1927, plaintiff obtained leave to and did file an

amended statement of claim to which Goldberg filed an affidavit of merits substantially the same as the one filed to the original statement of claim. The cause was tried before the court. There was a finding against Goldberg and he was made a party to the judgment entered as above set out against Sherman. Goldberg contended before the trial judge that he could not be made a party to the judgment against Sherman because he had not been served with a scire facias for that purpose. This contention was overruled by the trial judge. It is quite true that in a joint action in assumpsit there must be a judgment against all or none as held in Felsenthal v. Durand, 86 Ill. 230. And it is equally true that where judgment has been taken against one, the proper method to pursue to make the remaining defendant a party to such judgment is to sue out and serve against such remaining defendant a scire facias for that purpose. It must be conceded that an alias summons and a writ of scire facias are not the same as held in Sherburne v. Hyde, 185 *ibid.* 580. However, the informality we think, may be waived. If defendant had desired to advantage of the informality he should have done so by a motion to quash the summons. This he did not do but appeared and pleaded to the merits of the action, and went to trial on the issues thus formed. By so doing the informality was waived.

We think that the evidence as to the joint liability, in the absence of countervailing proof - of one of the defendants was sufficient to establish that fact and overcome the effect of the Goldberg plea of non-joint liability. The statements of Goldberg that there was a partnership between him and his co-defendant was admissible as evidence to prove the joint liability charged in plaintiffs claim against defendants.

There was a conflict in the evidence arising principally from the evidence of Goldberg. In no substantial particular was Goldberg corroborated by other believable evidence on the question of joint liability. The trial was before the court, who saw, as well as heard, the testimony of the several witnesses, and therefore much better able, than are we, to judge of the credibility of the several witnesses.

We find no lack of harmony in the courts' solution of the weight of the evidence or the credibility of the several witnesses so that under all the circumstances and all the proofs found in the record we would not be justified in interfering with the judgment of the Municipal Court and it is consequently affirmed.

AFFIRMED.

WILSON AND TAYLOR, JJ., CONCUR.

There was a conflict in the evidence relating especially to the evidence of Hildner. In an affidavit Hildner was sworn to by other witnesses who were sworn to by Hildner. The trial was held in 1934, after the war, as well as before, the testimony of the several witnesses and therefore was better able, than the way, by way of the credibility of the several witnesses.

He then on June 17, 1934, in the court, advised of the steps of the evidence as the credibility of the several witnesses as that must be the testimony and his testimony found in the record as well as in the testimony in the record as the subject of the Hildner trial and it is accordingly stated.

Witnesses on June 17, 1934, in the court, advised of the steps of the evidence as the credibility of the several witnesses as that must be the testimony and his testimony found in the record as well as in the testimony in the record as the subject of the Hildner trial and it is accordingly stated.

Witnesses on June 17, 1934, in the court, advised of the steps of the evidence as the credibility of the several witnesses as that must be the testimony and his testimony found in the record as well as in the testimony in the record as the subject of the Hildner trial and it is accordingly stated.

MAK International Motor Truck
Corporation, a Corporation,

Appellant,

v.

Robert Volk,

Appellee.

APPEAL FROM

Municipal Court

of Chicago.

Opinion filed October 3, 1928

MR. PRESIDING JUSTICE HOLBOM delivered the opinion
of the court.

The plaintiff and defendant entered into a contract dated August 10, 1926, by which plaintiff as vendor sold a certain motor truck to defendant part of the consideration of which was a certain used motor truck of defendant at the agreed price of \$1500. The transaction under the contract was closed and the purchase price paid by defendant and received by plaintiff which included defendant's used motor truck at the price of \$1500. The contract was duly executed by both parties. In the contract is the following provision:

"All previous communications between the parties hereto either verbal or written, with reference to the subject matter of this proposal are hereby abrogated, and the proposal duly accepted by the Purchaser and approved in writing by an Executive Officer of the Company constitute the agreement between the parties hereto, and no modification of this agreement shall be binding upon either party unless such modification shall be in writing and duly accepted and agreed to by the Purchaser and approved in writing by an Executive Officer of the Company."

The dispute between the parties is injected into the case by defendant's affidavit of meritorious defense which is to the purport and effect that plaintiff, for the purpose of inducing defendant

to purchase the truck in the contract set forth, agreed to accept an old truck owned by defendant at a valuation of \$1500, "and to cancel the then account of plaintiff against defendant which is the same account itemized in plaintiffs' statement of claim that defendant agreed to this proposition and on these terms purchased the said new truck from plaintiff; that by this transaction the account sued upon was paid and discharged".

The itemized claim set forth in plaintiffs statement of claim totaled \$254.50.

There was a trial by agreement before the court without a jury and a finding and judgment of nil capiat, and plaintiff brings the record here for our review by appeal.

No mention of plaintiff's account sued upon is found in the contract between the parties. By that contract defendants truck was received at a valuation of \$1500. The trial judge, in ruling on the contention of counsel for plaintiff that the contract between the parties was in writing and that oral contemporaneous understandings could not be received in contradiction of it, remarked in his ruling on such objection the following:

"The Court: Well, your objection will be overruled. I will hear that subject to objection. I understand the general rule is oral testimony can not be heard in contradiction of a written document, and that all previous negotiations are merged in the written agreement. Yet the court will hear, subject to objection, any circumstances attending the execution of these instruments."

The Judge stated a correct proposition of law but did not adhere to it in his judgment, but therein violated the rule so announced as a controlling condition.

There was a full agreement between the two parties and a full agreement was reached on all points, and the agreement was signed on the 10th of the month.

[illegible]

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It is elementary that the contract in writing of the parties is binding upon them and cannot in any manner be varied by any claimed contemporaneous understanding de hors such contract. The doctrine is stated in Grubb v. Milan, 249 Ill. 456:

" A written contract was entered into between the parties in which they set down what had been agreed upon between them. In an action on the contract it is presumed to have contained the whole of the agreement, and all previous conversations relating to the subject matter were merged in the written contract".

Schneider v. Sulzer, 212 *ibid.* 87; Fuchs v. Kittredge, 242 *ibid.* 88. Many other cases to a like effect might be cited.

The provision in the contract above set out is the agreement binding the parties and is but a recitation of a fact and firm legal principle.

For the errors pointed out the judgment of the Municipal Court is reversed and we will do here what the Municipal Court should have done by entering a judgment in this court for the sum of \$259.37, being \$250.00 with interest at 5 per cent per annum from January 6, 1928, the date of the erroneous judgment below.

JUDGMENT REVERSED AND HERE
FOR PLAINTIFF FOR \$259.37.

TAYLOR AND WILSON, JJ. CONCUR.

It is necessary that the contract be signed by
the parties in writing and that the contract be signed
by any other person authorized to sign the contract.
The contract is signed by James W. Hill, Dec 11, 1900.

A written contract was entered into between
the parties in writing and that the contract
was signed by the parties in writing and that
the contract was signed by the parties in writing
and that the contract was signed by the parties
in writing and that the contract was signed by
the parties in writing and that the contract
was signed by the parties in writing and that
the contract was signed by the parties in writing.

Witness my hand and seal, this 11th day of December, 1900.

Witness my hand and seal, this 11th day of December, 1900.
be signed.

The provision in the contract above set out is the
agreement between the parties and is not a condition of a loan and
is not legal evidence.

For the reasons stated and the judgment of the court
local court is reversed and it will be held that the contract above
should have been by recording a judgment in this court for the sum
of \$100,000,000 with interest at 6 per cent per annum
from January 1, 1900, the date of the recording judgment above.

WITNESSES:
FOR PLAINTIFF FOR DEBT, etc.

WITNESSES AND JUDGES, etc.

2507 A 627⁴

291 - 32232

BROADVIEW BUILDING CORPORATION,

Appellant,

v.

MORRIS EHRLICH,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed October 3, 1928

MR. JUSTICE TAYLOR delivered the opinion of the court.

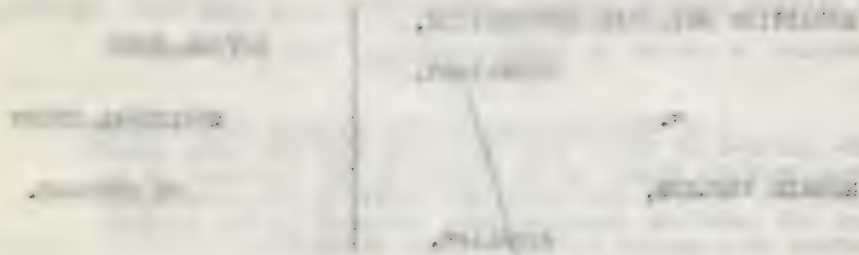
On January 15, 1927, the Broadview Building Corporation, as plaintiff, filed a statement of claim and cognovit in the Municipal Court, and obtained a judgment by confession upon a lease, against Morris Ehrlich, a lessee, as defendant, in the sum of \$300.00, together with \$25.00 attorney's fees.

On February 1, 1927, the defendant moved the court to vacate the judgment, and filed in support thereof, an affidavit; and on March 19, 1927, the trial judge entered an order permitting the defendant to make a defense, the judgment to stand as security.

There was a trial before the court, and on May 12, 1927, the court found the issues against the plaintiff, and entered judgment that the plaintiff take nothing by its suit, and that the defendant recover his costs. This appeal is from that judgment.

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On January 18, 1928, this court, in *Broadview Building Corporation, Appellee, v. Morris Ehrlich, Appellant*, General Number 31872, handed down an opinion affirming a judgment by confession for rent for the month of December, 1926, growing out of the lease involved in the instant case. This suit is for the rent of \$300.00 for the succeeding month of January, 1927, under the same lease, and the defense made in this case is, in our judgment, substantially the same as that made in the former case.

In the first case, a judgment was entered by confession for the rent for December, 1926, and a motion, supported by an affidavit, to vacate the judgment was overruled by the trial court, and upon the appeal to this court the judgment of the trial court in favor of the lessor was affirmed.

In the instant case, the judgment by confession for the January, 1927 rent was, upon motion of the defendant supported by an affidavit, at the trial, vacated and set aside, and judgment entered, as above mentioned, for the defendant, the lessee.

We have examined the petitions in both cases, which were filed in support of the motions to vacate, and find them substantially alike, save that in the instant case an additional fact was alleged, which it is claimed, together with the other allegations, justified setting aside and vacating the judgment in the present case.

In both cases, the defendant undertook to make out the defense of eviction; in the former case (the premises in

On January 12, 1934, this court, in reviewing
certain questions, decided, at that time, that the
court should not, because of the nature of the
subject of the case, the fact that the court was
then, and at the time of the review in the court was
this will be the fact of the court, and the review was
of January 12, 1934, under the same law, and the review was
in this case, it was decided, accordingly, the court
that was in the court was.

In the first case, a judgment was entered by the
court for the fact that the court, then, and a review, under
of an affidavit, as to the fact that the judgment was entered by
the court, and that the court was then the judgment
of the court in the case of the court was entered.

In the second case, the judgment of the court was
the court, then, and the fact of the court was
entered in an affidavit, as to the fact that the court was
and judgment entered, as to the fact that the court was
the court.

It was decided the judgment in the court, then,
was filed in court by the court in court, and that the
judgment was then in the court was an affidavit
that was entered, and it is decided, under the same
allegation, judgment entered, and judgment the judgment
is the court was.

In this case, the judgment entered in the court
the judgment of the court in the court was then reviewed in

question being a restaurant) claiming that the lessor caused the telephone service to be removed; caused the door of the lavatory to be equipped with a lock or coin device, and caused the locks on the door or doors of the banquet room to be changed, thus depriving the lessee of those appurtenances without his consent.

In the latter, the instant case, in addition to those elements of defense, the defendant claims that the plaintiff caused certain electric lights to be disconnected, and failed to furnish hot water in sufficient quantities.

We have examined the evidence, and it is our opinion that the judgment of the trial court is manifestly against the weight of the evidence, and that the judgment by confession should have been allowed to stand.

The evidence of Johnson, the President of the plaintiff company, and of West, the chief engineer of the Broadview Hotel, on the subject of the furnishing of hot water, which, as a matter of fact, was not considered in the former case, is very convincing. West testified that there was a Patterson Kelly hot water system, with thermostatical control, in the building in question. He described quite fully the way in which the control worked, and at what degrees it was fixed, and said that the thermostat was never, during any period from the first of September to the 10th of January, at a different temperature and pressure than 50 pounds and 140 degrees, and that the only way the hot water could be shut off from the dining room was by the spigots in that room. Further, inasmuch as in the affidavit in the former case no complaint was made,

question being a testamentary disposition. It is the duty of the court to determine whether the testator intended to make a testamentary disposition or not. In this case, the court found that the testator intended to make a testamentary disposition, and the will is valid.

In the instant case, the court found that the testator intended to make a testamentary disposition, and the will is valid. The court also found that the testator intended to make a testamentary disposition, and the will is valid.

It is the duty of the court to determine whether the testator intended to make a testamentary disposition or not. In this case, the court found that the testator intended to make a testamentary disposition, and the will is valid.

The will of the testator, the testator in the instant case, intended to make a testamentary disposition, and the will is valid. The court also found that the testator intended to make a testamentary disposition, and the will is valid.

on the ground that there was a failure on the part of the plaintiff to supply sufficient hot water, some question arises as to why the complaint is now, for the first time, made on that score in this case; it looks very much as though it were an afterthought and an effort to retry matters growing out of a situation which has already been passed upon.

Although at the time the instant cause was tried before the trial judge, we had not rendered our decision in the former case, and, therefore, the opinion in that case, to which we have referred, could not be pleaded as res adjudicata, we ourselves, are entitled, having rendered that opinion, to consider it, involving as it does, substantially the same issue, as res adjudicata. Launtz v. Russek Furniture Co., 247 Ill. App. 383. In that case, which involved a lease, the court said:

"Where a fact necessarily involved in litigation has been decided in a suit, and again becomes a matter at issue between the same parties in a subsequent suit, the former judgment is conclusive as to such matter. Louisville, N. A. & C. Ry. Co. v. Carson, 182 Ill. 347; Buerger v. Buerger, 317 Ill. 401."

We agree with what we said in the former case, and repeat it here;

"as to the particular matters of fact of which complaint is made by the defendant, we do not think that any, or all of them together, constitute a defense of plaintiff's claim for rent. It will be observed that the representations concerning the removal of the telephone pertained to matters that transpired over three months before the judgment was entered, and that the defendant had not seen fit to move out, but still retained possession of the premises, and paid the rent for the months of October and November. As to the representations that on November 15, 1936, the plaintiff caused the door of the lavatory to be equipped with a lock or coin device; that change may have been an improvement and for mutually advantageous purposes. As to the

representations concerning the use of the room on the main floor of the hotel commonly used for banquet purposes, and concerning which the defendant says in his petition that on December 3, 1926, the plaintiff caused the locks on the doors to be changed, thus depriving the lessee of access thereto; we do not think they are material."

The only additional substantial allegation in the instant case that was not set up in the former, concerns the matter of hot water, and concerning that we have stated our opinion above. The charge as to the electric lights was in no way proved.

For the reasons given, the judgment of the trial court is reversed and the cause remanded with directions that the judgment of May 12, 1927, be expunged and the judgment by confession of January 17, 1927, be allowed to stand.

REVERSED AND REMANDED WITH DIRECTIONS.

HOLDOM P. J. AND WILSON J. CONCUR.

representative presented for one of the men who
was with him at the time of the shooting. The man
presented, and identified, with the following words:
"I am certain that on November 7, 1937, the man who
killed the man in the house is the same man who
killed the man in the house. I am certain that he is
the same man who killed the man in the house."

The only additional information appearing in the
report was that the man was in the house, during the
time of the shooting, and identifying him as the man who
killed the man in the house. The above is the only
information appearing in the report.

For the reasons stated, the judgment of the trial
court is reversed and the case remanded with instructions
that the judgment of the trial court be reversed and the
case remanded with instructions that the judgment of the
trial court be reversed and the case remanded with instructions.

REVEREND AND HONORABLE JUDGE

HOLCOMB F. J. AND PIERCE J. CONCUR.

CENTRAL STATES GENERAL ELECTRIC
SUPPLY COMPANY, a corporation,

Appellee,

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

v.

LOUIS A. MANDEL, doing business
as STANDARD HARDWARE STORE,

Appellant.

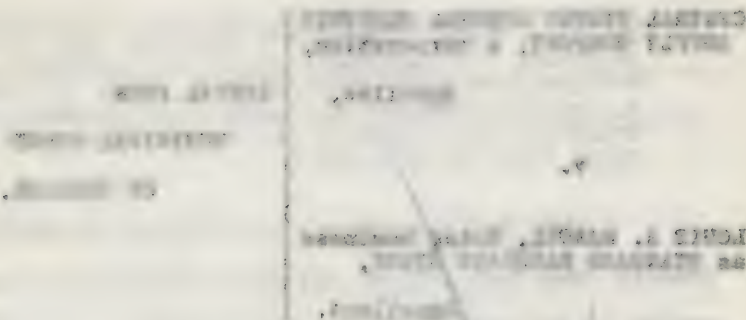
Opinion filed October 3, 1928

MR. JUSTICE TAYLOR delivered the opinion of
the court.

This is an appeal by the defendant, Louis A. Mandel, doing business as Standard Hardware Store, from an order of the Municipal Court overruling a motion by him to vacate a judgment entered by confession on June 21, 1927, in favor of the Central States General Electric Supply Company, the plaintiff.

On June 21, 1927, a judgment in the sum of \$234.89 (which included \$35.00 attorney's fees), was entered by confession in favor of the plaintiff and against the defendant, on a note dated June 6, 1927. The note was payable sixty days after date.

On August 26, 1927, a motion, supported by affidavit, was made for the defendant to have the judgment of June 21, 1927 vacated and set aside and to have the cause set down for a hearing on its merits. The affidavit, which was by the defendant, recited that he executed the note in the sum of \$199.89, due and payable sixty days after date; that contrary to the arrangement with the plaintiff to pay the debt at the end of sixty days, the plaintiff confessed judgment within fifteen days and added the



Opinion filed October 1, 1937

RE: JAMES EARL RAY, Defendant

THE COURT.

This is an appeal from the judgment of the United States District Court for the Southern District of New York, entered on June 11, 1937, in favor of the defendant.

The defendant, James Earl Ray, was charged with the murder of Dr. Martin Luther King, Jr., on April 4, 1968, in Memphis, Tennessee. The defendant pleaded guilty to the murder of Dr. King, and was sentenced to the death penalty. The defendant appeals from the judgment of the United States District Court for the Southern District of New York, entered on June 11, 1937, in favor of the defendant.

On June 11, 1937, a judgment was entered in the case of James Earl Ray, Defendant.

(which included \$50,000 attorney's fees), and entered by conclusion to favor of the plaintiff and against the defendant, on a note dated June 1, 1937. The note was payable to the order of the plaintiff.

On August 14, 1937, a motion, supported by affidavits, was made for the judgment to be set aside and a new judgment entered. The motion was granted, and a new judgment was entered on August 14, 1937, in favor of the plaintiff and against the defendant. The new judgment was entered on the basis of the facts and circumstances of the case, and was supported by affidavits. The new judgment was entered on the basis of the facts and circumstances of the case, and was supported by affidavits. The new judgment was entered on the basis of the facts and circumstances of the case, and was supported by affidavits.

sum of \$35.00 attorney's fees; that on July 19, 1927, at which time an execution was served on him, he, the defendant, was first informed that a judgment had been entered against him.

The affidavit further stated that he, the defendant, paid the plaintiff the sum of \$100.00 on July 21, 1927, and a further sum of \$25.00, leaving a balance of \$74.89; that he did not authorize the addition of \$25.00 attorney's fees; that one, O'Toole, while purporting to act as attorney for the defendant, acted as notary public and acknowledged the signature of William E. Gibbs, agent for the plaintiff, that O'Toole was ineligible to acknowledge the signature of Gibbs, who was a party interested in the proceedings.

The abstract of record discloses that "At the proceedings August 26, 1927, on motion of plaintiff, the court reduced the judgment heretofore entered by confession from \$234.89 to \$189.89, to which the defendant excepted."

On August 27, 1927, a motion supported by an affidavit of John E. Owens was made to vacate and set aside the judgment. In the affidavit it was stated that "a levy had been taken out on the execution," and that the charges then totalled \$24.00; that the judgment was void because the judgment by confession included the attorney's fees and was contrary to the power given by the note; and that the execution being issued on a judgment for an incorrect amount, was void. This motion was overruled.

No brief has been filed for the plaintiff.

[illegible]

The interest of the estate in the property was 100% and the estate was the sole owner of the property.

On August 27, 1937, a notice was received by an officer of the U. S. Bureau who was in charge of the case. The notice was received from the U. S. Bureau of Investigation, and it was stated that a very bad case had been found on the premises, and that the Bureau was very much interested in the case. The notice was received from the U. S. Bureau of Investigation, and it was stated that a very bad case had been found on the premises, and that the Bureau was very much interested in the case.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

It is contended for the defendant that a power to confess a judgment must be clearly given and strictly pursued, and on a departure from the authority conferred, the judgment will be reversed; that under the power of attorney granted in the note confessed on, no attorney's fees were mentioned, nor was any right or authority given the attorney to confess judgment for any attorney's fees; and yet the attorney who confessed the judgment under the power of attorney included \$35.00 as attorney's fees.

But in searching through the abstract of record, we do not find the full contents of the note are set forth. What, if anything, there was in the note on the subject of attorney's fees does not clearly appear; and such being the situation we are not entitled to hold that the court erred in reducing the amount of the judgment to the extent of \$35.00, which was an act in and of itself wholly favorable to the defendant.

For the reason stated the judgment is affirmed.

AFFIRMED.

HOLDOM, P.J. AND WILSON, J. CONCUR.

IMMEL STATE BANK, a corporation,
Plaintiff in Error,

v.

AETNA FURNITURE COMPANY, a corporation,
ALBERT ERNEST and ALBERT J. BURKHARDT,
Defendants in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

Opinion filed October 3, 1928

MR. JUSTICE TAYLOR delivered the opinion of
the court.

On November 4, 1926, the Immel State Bank, a corporation, as plaintiff, obtained judgment by confession in the Municipal Court of Chicago, against the defendants, Aetna Furniture Company, a corporation, Albert Ernest and Albert J. Burkhardt, upon a promissory note dated December 9, 1925, in the sum of \$2,460.00, together with \$133.00 for attorney's fees, making in all \$2,718.07.

On December 9, 1926, more than thirty days after judgment was entered, the defendants moved the court - supporting their motion by a verified petition - that the above mentioned judgment by confession be vacated and set aside. Pursuant to that motion, the court ordered the judgment to be opened and leave given to the defendants to appear and make a defense, and that meanwhile the judgment stand as security, and execution thereon be stayed.

In their petition, the defendants allege that at the time of the execution of the note, they, the petitioners, were president and treasurer of the Aetna Furniture Company,

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Opinion filed October 3, 1940

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On October 3, 1940, the Board of Directors of the United States Trust Company, Inc., advised the undersigned of the liquidation of the company. The company had been operating as a corporation since 1907, and had been a member of the Federal Reserve System since 1914. The company had a capital of \$1,000,000, and a surplus of \$1,000,000. The company had been operating as a corporation since 1907, and had been a member of the Federal Reserve System since 1914. The company had a capital of \$1,000,000, and a surplus of \$1,000,000.

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a corporation, and, as such president and treasurer, executed on behalf of the corporation the note sued upon; that they, Albert Ernest and Albert J. Burkhardt, did not sign the note individually; that the signatures appearing on the note are the signatures of Albert Ernest, as President and agent of the Aetna Furniture Company, and Albert J. Burkhardt, as Treasurer and agent of the Company; that the money evidenced by the note in question represented money loaned by the plaintiff to the Aetna Furniture Company; that Ernest and Burkhardt did not receive any part of that money; that the note was executed in the following manner, to-wit:-

Aetna Furniture Company,
Albert Ernest,
Albert J. Burkhardt, Treasurer;

that from the manner of the execution of the note it appears that the petitioners signed the note as president and treasurer of the corporation, respectively, which the plaintiff well knew at the time of the execution of the note; that on several occasions prior to the execution of the note, in the form as above set forth, Ernest and Burkhardt executed other notes to the plaintiff as president and treasurer; that the note sued on was a renewal of a previous note; that the plaintiff knew that the defendants, Ernest and Burkhardt, intended to execute the note as president and treasurer, respectively; that they, Ernest and Burkhardt, did not sign the note in question as endorsers or co-makers.

Pursuant to the opening of the judgment, a trial was had on February 8, 1927, before the court, without a jury. In the course of the trial, the trial judge held that the note in question was not admissible as against the defendant

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Albert Burkhardt, and at the close of all the evidence found the issues for the plaintiff as to defendant Aetna Furniture Company, and in favor of the defendants Ernest and Burkhardt as to the plaintiff, and ordered that the judgment theretofore entered against the Aetna Furniture Company should stand, but as to the defendants Ernest and Burkhardt, the judgment against them should be set aside, vacated and held for naught. This appeal is by the plaintiff, the Bank, from that order.

As to the evidence which was introduced, the record discloses substantially the following:- The note here sued on was dated December 9, 1925 and was the outgrowth of a series of notes given over a period of time, beginning May 5, 1923. The first note being of the latter date, was for \$5,000.00, and was signed, "Aetna Furniture Company, by Albert J. Burkhardt, Secy. & Treas., Albert J. Burkhardt, Herman Griep and Albert Ernest." It was given, according to the testimony of Burkhardt, in order that the Aetna Furniture Company, which was just starting in business, and had no book accounts nor bills receivable, might borrow \$5,000.00. Burkhardt, the defendant, testified further, that John Immel, an officer of the Bank, said, "We will loan you \$5,000.00 provided you endorse the notes individually. We are willing to do this until the firm gets on such a standing as it will not need such endorsements."

On August 3, 1923, the note of May 5, 1923, was taken up and a renewal note given in its stead. On August 14, 1923, the Aetna Furniture Company borrowed \$5,000.00 more from the bank and gave its note therefor. Both those notes were renewed in November and were payable on January 30, 1924,

and from that time until the execution and delivery of the renewal on which suit is brought, payments were made on behalf of the Aetna Furniture Company, and renewal notes given from time to time for the balance.

The note of August 3, 1923 was signed, by Albert Ernest, Pres. and Albert J. Burkhardt, Secy. & Treas. The note of August 14, 1923, for the additional \$5,000.00, was signed, "Albert Ernest and Albert J. Burkhardt," and endorsed by them. A renewal note of November 5, 1923, for \$5,000.00 was signed, "Aetna Furniture Company, Albert Ernest, Pres., Albert J. Burkhardt, Treas.," and was guaranteed by Albert Ernest and Albert J. Burkhardt. That note, however, was not offered in evidence, and there was testimony that it was lost, and a renewal note for \$5,000.00, dated November 14 was signed in a similar way. That note was not offered in evidence. On January 30, 1924, the \$5,000.00 notes of November 5 and November 14, 1923 were consolidated. That note was lost. Testimony was given that it was signed, "Aetna Furniture Company, Albert Ernest, and Albert J. Burkhardt," and guaranteed by Albert Ernest and Albert Burkhardt. The note of January 30, 1924, was renewed on April 30, 1924. The renewal note made for \$10,000.00, due in 90 days, was signed, "Albert J. Burkhardt and Albert Ernest," and endorsed by them. That note was renewed on July 28, 1924, and was signed "Aetna Furniture Company, Albert Ernest, Pres. Albert J. Burkhardt, Treas.," and Guaranteed on the back by Albert Ernest and Albert J. Burkhardt. On that note, \$2,500.00 was paid. A renewal note was given for the balance of \$7,500.00. That renewal note was given on October 27, 1924, and was signed and guaranteed the same as the preceding note, being that of July 28, 1924. In January, 1925, a renewal was given for the note of October 27, 1924. That note, the testimony is, was

lost. For that note a renewal note was given for \$7,500.00, and the testimony is that it was signed and endorsed in the same way as the one for which it was a renewal. That note, which was due in April, 1925, was renewed for 90 days in the sum of \$7,500.00. The testimony is, that note was lost; that it was signed, "Aetna Furniture Company, Albert Ernest, Pres. Albert J. Burkhardt, Treas." and was guaranteed by Albert Ernest and Albert Burkhardt. On July 27, 1925, that \$7,500.00 note was renewed. It was signed, "Aetna Furniture Company, Albert Ernest, Pres. and Albert J. Burkhardt, Treas.," and endorsed Albert Ernest and Albert J. Burkhardt, and was offered in evidence. It was renewed for 30 days and became due August 26, 1925. \$1,500.00 was paid on that note, and there was a renewal given for \$8,000.00. There is testimony that that note, also, was lost and that it was signed as follows: "Aetna Furniture Company, Albert Ernest, Pres. and Albert J. Burkhardt, Treas." The testimony of Burkhardt is that it was not guaranteed on the back. That note was renewed on September 28, 1925. It became due on October 10, and on October 13, 1925, \$3,000.00 was paid thereon, and a renewal note, on that date, given for 30 days in the sum of \$3,000.00. There is testimony that the note for \$3,000.00 of October 13, 1925 was lost and that it was signed, "Aetna Furniture Company, Albert Ernest, Pres. and Albert J. Burkhardt, Treas.," and had no guarantee on the back. Apparently, according to the testimony, a renewal note was given in place of the one due November 9 for \$3,000.00, which renewal note became due December 9, 1925, and was signed, "Aetna Furniture Company, Albert Ernest, Pres. Albert J. Burkhardt, Treas.," and had no guarantee on the back. On December 9, 1925, the note upon which this suit is based, was then given, being for \$3,000.00, due in 61 days after date, and signed, "Aetna Furniture Company, Albert Ernest, Albert J. Burkhardt, Treas." On the back of the

note are the endorsements, "Feb. 19, 1926, Rec'd. a/c \$540.00, balance due \$2,480.00."

It is the evidence of P. J. Immel that the \$6,000.00 note bore the signatures of Ernest and Burkhardt as guarantors, and that the note for \$3,000.00, which was the one immediately preceding the one sued on, was also guaranteed in the same way. That evidence was corroborated by H. J. Immel. There is a direct contradiction in the testimony of the Immels, on the one hand, and the testimony of Ernest and Burkhardt, on the other, as to what was said at the time the note being sued upon was given. It is the evidence of H. J. Immel that all of the Aetna Furniture Company notes were guaranteed except the one sued upon. It is the evidence of Albert Ernest that Burkhardt signed the name, "Aetna Furniture Company" to the note in question, and then signed his own name down below, and that he, Ernest, wrote his name in between; and it is the evidence of Burkhardt that he signed the name, "Aetna Furniture Company" first, left a space for the name of Ernest, and then signed his own name underneath. Ernest testified further that he could not tell why the word "President" was omitted from the note in question.

The latter part of September, 1925, the Aetna Furniture Company turned over its assets to a creditors committee for liquidation; and upon final liquidation of the company's assets, 80% of its liabilities had been paid, the plaintiff having received a total dividend of \$540.00, leaving a balance of \$2,400.00 unpaid.

The question arises as to the liability of Ernest and Burkhardt. In Germania Nat. Bank v. Mariner, 129 Wis. 544, a case where a note was signed as follows, "The Northwestern Straw Works, E.R. Stillman, Treas., John W. Mariner," the court said,

"The question as to the liability of Mr. Mariner under the facts stated is certainly not free from difficulty. The general rule is well supported that when it clearly appears, either in the body of the note or by appropriate words added to the signatures themselves, that a corporation is the party making the promise, there is no individual liability on the part of the signers."

We do not find anything in the Negotiable Instrument Law that applies to the particular case here involved. Paragraph 37 (6), Chap. 98 of the statute on Negotiable Instruments contains the following: "Where a signature is so placed on an instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an endorser." That, however, we think does not apply to the facts in this case, as it is obvious from the contents of the note that he, Ernest, placed his signature thereon as maker, either individually or in a representative capacity, and the contingency mentioned in the section just quoted does not arise. It follows, therefore, that whether or not Ernest, and the same may be said of Burkhardt, is liable personally, must be determined according to the general principles of the common law.

In Selover on Negotiable Instruments, Section 21, appears the following,

"The ambiguity being as to whether one signing as a maker intended to do so in a representative or an individual capacity, the doubt may be removed by parol and extrinsic evidence."

In the Mariner case, *supra*, the court said,

"It is elementary that, in case a written contract is ambiguous in its terms, parol proof of the facts and circumstances under which it was executed may be introduced to aid in its construction. This rule applies to commercial paper, even in the hands of third persons, because, where the ambiguity is apparent to a reasonably

prudent man on the face of the paper, he is necessarily put upon inquiry." (Citing Sechem, Agency, Sec. 443; Hood v. Hallenbeck, 7 Mun, 362; 10 Cyc. 1051; 4 Thompson, Corp. Sec. 5141.)

Thompson v. Hasselman, 131 Ill. App. 257; Derby v. Gustafson, 131 Ill. App. 281; Scanlan v. Keith, 102 Ill. 634.

In Daniels on Negotiable Instruments, 6th Ed., Vol. 1, Sec. 398, it is said that

"where it is manifest from the face of the instrument, that it was executed, for a corporate purpose; where, to use the language of the United Supreme Court, 'the marks of an official character not only exist on the face, but predominate,' (Mechanics' Bank v. Bank of Columbia, 5 Wheat. 356) it is, as a general rule, to be regarded as the paper of the corporation, and not as that of the individual officer or agent.

It will be observed that the order of the names as they appear in the signature to the note in the instant case is much stronger evidence that it was intended that, all taken together, they should constitute the signature of the corporation than the order of the names in the Mariner case, as in that case Mariner's name appeared not between the name of the corporation and the name of the treasurer but after them.

As to what the evidence showed in regard to the capacity in which Ernest and Burkhardt signed the note, although it is conflicting, we do not feel entitled to override the judgment of the learned trial judge. It follows, therefore, that as he was of the opinion that the signatures of Ernest and Burkhardt were attached solely in a representative capacity and as agents of the corporation, the judgment must stand.

For the reasons stated, the judgment will be affirmed.

AFFIRMED.

HOLDOM, P. J. AND WILSON J. CONCUR.

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Approved and authorized by the Board of Directors of the City of New York, on 11/17/2011.

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Library of Theological Studies, University of Toronto

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Source: U.S. Census Bureau, *Current Population Reports*, 1990.

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CITY OF CHICAGO,

APPELLEE,

vs.

VERA DOBROW,

APPELLANT.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

Opinion filed October 3, 1928

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal prosecuted by Vera Dobrow, the defendant, to reverse a judgment entered upon a verdict of a jury, assessing a fine of \$100.00 against her in favor of the City of Chicago. No brief has been filed on behalf of the City.

The action was brought by the City of Chicago against the defendant upon a complaint signed by one George Blair, which stated that Vera Dobrow, the defendant, on September 30, 1927, in the City of Chicago, "did make, aid, countenance and assist in making an improper noise, disturbance, breach of the peace and diversion tending to a breach of the peace, in violation of Section 2655 of the Chicago Municipal Code of 1923."

At the trial, which was before the court with a jury, George Blair, who made the complaint, testified that he was in the business of manufacturing women's coats at 347 West Adams Street; that he employed about thirty-five people; that they were union help, members of the International Ladies Garment

Workers Union; that they were in his employment on September 30, 1927; that on the morning of that day, when all of his help were working and there was no dispute regarding wages or conditions, Vera Dobrow, who was not employed by him, walked up and down the sidewalk in front of his premises carrying a sign. In the abstract of record it is stated that the sign she was carrying contained the following: "Strike; 327 West Adams Street; Locked Out Workers." An examination of the record, however, fails to show what the contents of the sign was.

A police officer, Hanson, who arrested the defendant, testified that on the morning in question he saw her walking in front of the premises carrying a sign; that he informed her that she was under arrest, and took her to the police station; that he saw her near the premises in question many times.

The defendant, Vera Dobrow, testified that she was employed by Goldstein & Company; that she was a member of the International Ladies Garment Workers Union; that on September 30, 1927, she was carrying a sign in front of Blair Brothers, because people were locked out; that two people were discharged on account of a factional dispute; that she was picketing the shop, carrying the signs, but that there was no disturbance or noise there at the time; that there was a factional dispute of the International Ladies Garment Workers Union; that she belonged to the faction known as the left wing; that she did not know how many people were employed by Blair Brothers; that on the morning in question, at about seven o'clock, she began walking up and down in front of the premises; that she was arrested about half past seven; that she did not speak to Mr. Blair; that she never knew him;

that the people who were discharged were discharged on account of the factional dispute; that they were members of the Union.

It is urged for the defendant that the verdict was against the weight of the evidence; and that the argument by counsel for the City was inflammatory and intended to prejudice the jury, and was not supported by the evidence.

If the jury believed from the evidence, as they were entitled to believe, that there was no strike on, and that Vera Dobrow picketed the premises, carrying a sign undertaking to inform passersby that there was a strike pending, when as a matter of fact she was carrying the sign not because there was a strike, but because of something which was the outgrowth of a factional dispute in the International Ladies Garment Workers Union, it certainly follows that they were entitled to hold that the defendant was guilty of disorderly conduct, in violation of Section 2655 of the Chicago Municipal Code.

Further, regardless of whether or not there was a strike, inasmuch as the original record before us does not show what the contents of the signs were, which it is admitted she carried, all the evidence which was before the jury is not before us, and in that situation we are entitled, and it is our duty, to assume that the evidence was sufficient to justify the verdict.

The contention that counsel for the City indulged in argument in the course of the trial that was inflammatory and

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Dr. Indira Gandhi, New Delhi, India, 1984. Photo: G. S. P. / Getty Images

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Journal of the Royal Society of Medicine 1991; 84: 103-105

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The authors are grateful to the referees for their helpful comments.

DOI: 10.1002/anie.200706989

improper to such a degree as to justify a reversal of the judgment, is wholly untenable.

For the reasons stated, the judgment will be affirmed.

AFFIRMED.

HOLDOM, P. J. AND WILSON, J. CONCUR.

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WILLIAM SUCHIER,

APPELLEE,

vs.

CLARICE DU SOLD,

APPELLANT.

APPEAL FROM

COUNTY COURT

COOK COUNTY.

Opinion filed October 3, 1928

MR. JUSTICE TAYLOR delivered the opinion of the Court.

On September 26, 1927, William Suchier filed a petition in the County Court of Cook County, alleging that he had been arrested under a writ of capias ad satisfaciendum, issued out of the Superior Court, in favor of Clarice Du Sold, for the sum of \$7,500.00, and was desirous of releasing his body from such arrest by delivering up his property.

The matter came on to be heard in the County Court on October 25, 1927. The declaration and verdict in the suit of Clarice Du Sold v. William Suchier, Case No. 441833, in the Superior Court, were put in evidence, and it was agreed that in that case in the Superior Court the record showed that the first and second counts of the declaration had been dismissed, and that at the trial, a verdict was rendered on the third count.

The third count charged that Clarice Du Sold was a passenger in a Yellow Cab which was being driven in a southerly direction in Lincoln Park in the City of Chicago and that the defendant Suchier was in possession of ad

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operating a certain motor vehicle in the said Lincoln Park in a northerly direction, and that while said Du Sold was in the exercise of ordinary care for her own safety, the defendant Suchier, with utter disregard of the consequences, did recklessly drive and operate his said motor vehicle to the left of the center of the beaten track of the said highway and did wilfully and wantonly run into, collide with and strike against the taxicab in which the plaintiff, Du Sold, was riding so that as a direct and proximate result of the wilful and wanton conduct of the defendant, Suchier, said plaintiff, Du Sold, was seriously and permanently injured.

The evidence at the hearing in the County Court showed also that in the tort case in the Superior Court the jury found the issues against the defendant, Suchier, assessed damages in the sum of \$7,500.00 against him; and that a judgment was entered thereon in favor of Clarice Du Sold.

At the close of the hearing in the County Court, the learned trial judge being of the opinion that malice was not the gist of the action, entered judgment discharging the defendant from the custody of the sheriff. In our opinion that was error.

In Fetz v. The People, 239 Ill. App. 250, this court, considering a situation of fact quite similar to the one in the instant case, held that malice was the gist of the action. In that case we said,

"When the jury found Fetz guilty there were but two counts in the declaration, one of which charged that he wilfully, maliciously and wantonly

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drove his automobile, and the other that he, with force and arms, assaulted the plaintiff. Each of those charges connotes malice as it is generally defined when making a legal interpretation of the word as used in such a statute as the one in question."

In the instant case the language of the declaration that "the defendant Suchier, with utter disregard of the consequences, did recklessly drive and operate his said motor vehicle or automobile to the left of the center of the beaten track of the said highway, and did wilfully and wantonly run into, collide with and strike against the said taxicab so operated by the Yellow Cab Company as aforesaid and in which plaintiff was riding as aforesaid, so that as a direct and proximate result of the negligence of the Yellow Cab Company and the wilful and wanton conduct of the defendant, W. H. Suchier, the said plaintiff was seriously and permanently injured," is certainly as strong as that found in the Fetz case, *supra*. In the latter case we cited from Bromage v. Prosser, 4 Barn. & C. 247, the following, "Malice in common acceptance means ill-will against a person; but in its legal sense it means a wrongful act done intentionally, without just cause or excuse." Seney v. Knight, 292 Ill. 206; Jernberg v. Mix, 199 Ill. 254; Kellar v. Norton, 228 Ill. 356; In re Murphy, 109 Ill. 31; First Nat. Bank of Flora v. Burkett, 101 Ill. 391.

In the County Court, counsel for the petitioner undertook to show that in the tort case Suchier settled with a co-defendant, the Yellow Cab Company, and received compensation for the repair of his cab, and that that was evidence that the

petitioner was not responsible; but, as the judgment in the tort case stands as res adjudicata, all such evidence was irrelevant and incompetent.

The petitioner having failed to show that malice was not the gist of the action, it follows that he was not entitled to be released. The judgment of the County Court will be reversed with directions to remand the petitioner, William Suchier, to the custody of the sheriff.

REVERSED WITH DIRECTIONS.

HOLDOM, P. J. AND WILSON, J. CONCUR.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the Republic of China (Taiwan) regarding the activities of the Chinese Communist Party in the United States.

The position would be to have a new law
and not the first of the series, it being said to be
enacted as a reference. The language of the bill
will be revised with reference to the position,
which is the subject of the bill.

.....

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ABE ROSS,

Appellee,

v.

NENSEL - COFFMAN COMPANY,
a corporation, and J.
PRESTON SCOTT,

Appellants,

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed October 3, 1928

MR. JUSTICE TAYLOR delivered the opinion of the
Court.

On September 13, 1927, Abe Ross, as plaintiff,
filed a statement of claim in the Municipal Court, which is
substantially as follows:

"that on or about to-wit, February 14th, 1927,
and prior thereto, defendants then and there
requested plaintiff to procure a purchaser for
a hotel located at 555 - 557 Surf St. Chicago,
Illinois, and known as the Surf Ridge Hotel, and
plaintiff further states that defendants then and
there promised and agreed to pay plaintiff in
consideration for services rendered in procuring
such purchaser the sum of \$500.00%

"that relying upon such promises, he then and
there furnished his said services in the procure-
ment of such purchaser, and further alleges that
he has procured such purchaser, one Benjamin
Rosenstein, and further states that the said
Benjamin Rosenstein, on to-wit, February 14th,
1927, purchased said Surf Ridge Hotel from one
Harvey Wenzel, and plaintiff further alleges that
the said Wenzel then and there paid to the said
defendants the sum of \$1500.00 as brokerage fees
and commission.

"that the said defendants have failed and refused
to pay to plaintiff the sum agreed upon, namely,
\$500.00, but states that the said defendants have
tendered to plaintiff the sum of \$250.00 instead,
which plaintiff refuses to accept, and wherefore
plaintiff brings his suit for the aforementioned

sum, together with the legal interest thereon."

On October 4, 1927, there was filed by L. O. Hensel, President of the Hensel-Coffman Company, on behalf of the defendants, Hensel-Coffman Company, a corporation, and J. Preston Scott, an affidavit of merits, which contained, substantially, the following: -

"Affiant denies that the Hensel-Coffman Company, a corporation and J. Preston Scott on, to wit: - the 14th day of February, 1927 requested plaintiff to procure a purchaser for the premises located at 555 - 557 Surf Street, Chicago, Illinois and further denies that the said Hensel - Coffman Company, a corporation and J. Preston Scott, promised and agreed to pay the plaintiff in consideration for his services the sum of five hundred (\$500.00) dollars.

"Affiant further states that the said defendants did not tender to plaintiff the sum of two hundred fifty (\$250.00) dollars as alleged by plaintiff in his statement of claim.

"Affiant further states that the Hensel-Coffman Company, a corporation and J. Preston Scott are duly licensed real estate brokers, licensed by the State of Illinois and the City of Chicago to engage in the brokerage business in the City of Chicago and State of Illinois respectively; and that the said defendants are also members of the Chicago Real Estate Board; and that they are never permitted to make any arrangements or agreements for the transaction of real estate matters with persons not duly licensed by the State of Illinois or the City of Chicago.

"Affiant further denies that the premises at 555-557 Surf Street in the City of Chicago were sold to Benjamin Rosenstein through the efforts of plaintiff herein as alleged by him in his statement of claim.

"Affiant further states that the plaintiff was not on the 14th day of February, 1927, a duly licensed real estate broker, that he did not have a license from the City of Chicago permitting him to engage in the real estate and brokerage business and that he therefore is not entitled to maintain a suit for brokerage commissions against defendants herein."

There was a trial before the court, without a jury.

Counsel for the plaintiff in his opening statement to the court, stated that on or about February 14, 1927, the defendants entered into an oral agreement that if the plaintiff

1. *Journal of the American Medical Association*, 1998; 280: 1001-1005.

On November 4, 1989, there was a fire in the

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the following, West-Indian Society, a committee, the

Sanitation made efforts to divert the use of animal manure to

• *majority of the following*

1. The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, regarding the land owned by the United States in the State of California:

*LITTON further states that the said document
did not contain any reference to the fact that the
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the absence of him.

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1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Finally, the last step in the process is to implement the plan and monitor the results. This involves putting the plan into action and tracking the progress of the solution. Once the problem has been solved, the final step is to evaluate the results and determine if the solution was effective. This involves comparing the results of the solution to the original problem and determining if the problem has been solved. If the problem has not been solved, the process may need to be repeated.

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would procure a purchaser for a certain hotel on Surf Street they would pay him the sum of \$500.00; that the plaintiff procured a purchaser with whom the deal was finally consummated; that the defendants had collected their entire commissions; that the defendants then offered to pay the plaintiff \$250.00, which he refused.

Counsel for the defendants in his opening statement, stated that there never was such an agreement made; that the plaintiff was in the brokerage business; that he was not licensed by the Department of Registration and Education of the State of Illinois; that he had tried to make deals with the defendants; that on February 14, the date the plaintiff alleges the verbal agreement was made, he, the plaintiff, was not a duly licensed real estate broker, authorized to do business by the statute of the State of Illinois, or by any ordinance of the City of Chicago.

The only witness that testified at the trial was Abe Ross, the plaintiff. His testimony is substantially as follows: - He resides at 4651 Magnolia Avenue, Chicago, and is and has been in the hotel business for about five years. He knew the Hensel-Coffman Company, and also Scott. Scott was employed by the Hensel-Coffman Company at the offices of Hensel-Coffman Company. He saw Scott, and the latter asked him if he knew anybody who wanted to buy the Surf Hotel, and he, the witness, said, "not at that time, but if I know I'll bring somebody over." "I brought over a party to see that hotel and I know that the man was not fitted and so I talked to my brother and got him interested to get in this line of business." His brother is Ben Rosenstein. He got his brother Ben Rosenstein

would procure a passport for a certain period on which they
they would pay him the sum of \$10,000; that the plaintiff
procured a passport with which the two men finally succeeded;
that the defendant had received from the plaintiff \$10,000;
that the defendant had allowed to pay the plaintiff \$10,000,
which he received.

Second: In the defendant's in his opening statement,
stated that there were no such an agreement with the
plaintiff and in the defendant's statement that he was not
involved in the agreement of registration and insurance of
the State of Illinois; that he had failed to pay him any
the defendant; that on February 14, 1934, the defendant
alleges the verbal agreement was made, but the plaintiff, you
and a copy of the same was made, contained in an
statement by the defendant to the State of Illinois, or to any
officers of the State of Illinois.

The only statement that testified at the trial was
the one, the plaintiff. The testimony is substantially as
follows: - He resides at 1011 North La Salle, Chicago, and is
and has been in the hotel business for about 15 years. He
from the hotel-City Hotel, and also from the hotel-City
- owned by the hotel-City Hotel, and the defendant owned his
hotel business. He was born, and the defendant owned his
from Chicago and came to New York City, and he, the
witness, said, that at that time, but in a few days
sincerely sorry. I should have a party in New York and
I knew that the man was not fitted and so I asked to go to
and get him interested in getting in this line of business. His
business is in New York.

and J. Preston Scott to meet at the office of Hensel-Coffman Company. At the meeting Hensel, and the witness himself were present. At that meeting, on the subject of commission, Scott said, "Whatever we take, one third goes to him, one to the office, and one I take." Hensel was present when that statement was made. After that conversation, Scott, the witness and his brother, went out to see the property. The owner of the property was one Winslow. After that, the property was sold by Winslow to Ben Rosenstein, the defendants acting as the brokers and collecting the brokerage commission on the sale. A certified check, apparently for \$1,000.00, although the record is somewhat ambiguous, was given and Scott and Ben Rosenstein went over to Herron's office and drew up an agreement. A check was given to Mr. Scott as earnest money. While in Herron's office he, the witness, asked Scott what he would get out of it. Scott answered, "I couldn't write up an agreement without the office," and I said, "I'll leave it to Mr. Scott, he won't cheat me." At Herron's office at that time Scott said he would give him, the witness, \$500.00 "when the case was closed in the property." At the time, his brother, Hensel, and himself were all present. Scott's office was connected with Hensel-Coffman Company. They were located at 3659 Broadway, in the real estate business. Scott had a desk in there with his name on it, and was one of their main men. About five or six months after the deal was consummated, he had a talk with the Hensel-Coffman Company, at which Scott, Hensel and himself were present. At that time Hensel offered him \$250.00; and Scott said, "That things were not so good, they would like me to take \$250.00;" He refused the offer.

and J. Thomas Hunt to meet at the office of Hunt-Carlson
Company, at the meeting house, and the witness himself was
present. At that meeting, on the subject of settlement, Hunt
said, "before we go, we will have to see
Hunt, and see if he will." Hunt was present at that meeting
and said, "after that investigation, Hunt, the witness and his
brother, went out to see the property. The owner of the property
told the witness that the property was sold by
Hunt to his brother. After that, the witness was told by
Hunt that the witness, the witness said to the witness
and following the investigation conducted on the site, a settlement
was made, approximately \$12,000.00, although the witness is somewhat
reluctant, and after all that and the witness said that he
Hunt's offer was not up to the agreement. I then was given to
Hunt, Hunt as witness money. Hunt is Hunt's offer to the
witness, Hunt said he would not do it. Hunt answered,
"I couldn't take an agreement without the witness," and I
said, "I'll leave it to you, Hunt, he won't want it." I
Hunt's offer at that time Hunt said he would not do it,
Hunt, Hunt, "that the case was closed in the property."
at the time, the witness, Hunt, and Hunt with all present.
Hunt's offer was conducted with Hunt-Carlson Company. They
were located at Hunt's property, in the well water building.
Hunt had a house in Hunt's place at 12, and was not at
their own time. Hunt was at the meeting after the sale was com-
pleted, he was a full wife the Hunt-Carlson Company, at
that time, Hunt and Hunt were present. At that time
Hunt offered the \$12,000.00 and Hunt said, "that offer was
not so good, that would like to be \$12,000.00," he refused
the offer.

He further testified that on an occasion prior to his visit to the office of Hensel and Coffman Company, he made a demand on Scott, and when asked what Scott told him, the witness, he gave the following answer:

"At first when the deal was closed and I asked Mr. Scott, where do I come in; he said, 'Listen we have One Thousand Dollars in cash and a note for' sixty or thirty days, I don't know, sixty days, I think, 'and as soon as I cash the note in I'm going to give you the Five Hundred. I know you don't need it as bad as I do.' I said, 'all right, Mr. Scott, that suits me.' Then I made the proposition to Mr. Scott 'Give me that note and I'll discount the note at my bank and I'll give you the balance.' And he said, that won't look so nice because he was a high class client. 'All right,' I said, 'Let it ride for sixty days.' Then when the sixty days passed I waited ten or 15 days more and I called Mr. Scott - I asked, did you cash the note and he said, 'Yes,' I said, why don't you send me the money and he said, I'll send it later and he kept on promising and when I seen it it was just a stalling, so he called me and told me that they 'dasn't' give it to me; that I'm not a licensed man. I said, 'What do you mean? I'm not a real estate man. I'm not in the brokerage business. I just brought you a customer and it is for services.' "

He further testified that Scott talked to him with reference to becoming a real estate salesman, that Scott said the best thing to save them trouble and a lot of red tape was for the plaintiff to file an application for a salesman's card; that, accordingly, he filed an application for a salesman's license, and a blank application was given to him by Scott, and Scott helped him to make it out in the offices of Hensel-Coffman Company; that he gave the application and \$2.00 to Scott, and Scott said it would have to go to Springfield and be filed, and then "he would give me the \$500.00 as soon as he gets my card;" that about two months later he, the witness, wrote a letter to Springfield and asked if his application to be a salesman was filed, and received an answer that it was not; that he finally got his salesman's license; that he got it at Scott's office;

that when he got it Scott made the proposition offering to give him \$250.00; that that amount was offered to him by Hensel in the form of a check; that Hensel said, "Mr. Ross, I will give you \$250.00 if you will settle the case;" that he, the witness, refused the proposition.

When first asked if he ever negotiated any real estate deals, he answered in the negative, and when asked if he ever tried to negotiate real estate deals, he answered, "Yes, Sir, I tried to."

Counsel for the defendants asked the witness if he ever tried to engage in any other real estate deal. That was objected to and the objection sustained.

Counsel for the defendants then stated to the court the following: - "I desire to show that this man was engaged in the real estate business. He was a broker long prior to February 14, 1927 when this alleged deal was made. He was a broker and did not have a license either from the City of Chicago to engage in the real estate business, nor was he registered by the Illinois Department of Registration and Education to engage in the real estate business as provided for by statute. He had been engaged in the brokerage business, and did not have a license either from the City or State." To that, the trial judge responded as follows: "Your argument is not a prope, and your tender to show the facts which you propose to show has not material effect in this case." Counsel for the defendants said, "Your Honor can enter your decision. That is part of my primary defense. I will go up on that," to which the Court responded, "Acting on the suggestion of counsel, I will. Five Hundred Dollars (\$500.00) finding for plaintiff." Judgment was entered for that amount. This appeal is therefrom.

that when he got to the door the policeman standing in the
him down; that the man was allowed to go to the door to
the form of a check; that the man was told, "I will give
you \$100.00 if you will accept the money; that he, the witness,
refused the proposition.

"I am glad to hear that you are well," he said.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the Communist Party in the United States.

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Thanked for Exhibit." Judgment was entered for that amount.
on motion of counsel, I will give judgment against (DNC, CO)
to be or that," so which the Court responded, "Adding on the
enter your decision. That is part of my duty as follows. I will
this case." Counsel for the defendant said, "Your Honor has
the facts which you propose to show are not material effort in
followed: "That argument is not a ruling, and your honor is clear
from the City of State." To that, the trial judge responded as
in the previous judgment, and did not have a second effect
state business as provided for by statute. He had been engaged
movement of testimony and testimony in regard to the fact
in the state business, and was he testified by the Illinois
did not have a license either from the City of Chicago or from
14, 1917 when this alleged deal was made. It was a private sale
of the real estate business. He was a citizen long after he became
the following: - "I desire to show that this man was engaged in

Counsel for the defendant then stated to the court:

The foregoing statement of the case has been made quite full in order that the reasons for sending the case back may be better understood.

The question arises was the defendant entitled to introduce evidence in an endeavor to show that the plaintiff was in the real estate business and unlicensed, either as a real estate salesman for the defendant, or as a real estate broker?

It is claimed for the plaintiff that the right of a salesman for a real estate broker to recover compensation from the broker based upon commissions received by the broker for the negotiation for the sale of real estate effected by the salesman is not affected by the fact that the salesman did not have a certificate of registration as a real estate salesman, as required by statute, and Jarnaz v. Ramon, 245 Ill. App. 600, is cited in support of that contention.

On the other hand, the defendants claim that they were entitled to show that the plaintiff had acted in more than one isolated instance as a real estate broker; and they make that claim for the reason that if he had done so and he was not registered as a salesman, or as a real estate broker, he would not be entitled to recover; that under the statute, with proof that he had acted before as a real estate broker in "selling or offering for sale," and was not registered, he could not recover, his alleged contract being illegal and in violation of the statute.

Section 1 of Chapter 17 a, "An act in relation to the definition, registration and regulation of real estate brokers and real estate salesmen" in force July 1, 1921, provides in part, as follows:

The foregoing statement of the facts has been made
before this in order that the reasons for making the same plain
may be better understood.

The meeting at which the defendant testified as
indicated in the statement is an interview in which the defendant
was in the trial before the jury and witness, either as a
test witness or as the defendant, as in a test witness
position.

It is claimed that the defendant told the jury of
a witness for a test witness position in various communications from
the witness from communications received by the witness for
the defendant for the sake of test witness position of the
defendant. It was stated by the jury that the witness did not
have a certificate of registration as a test witness witness,
as required by statute, and that the witness did not
is also in support of this contention.

On the other hand, the defendant claims that they
were called to show that the defendant was called to show that
the defendant witness was a test witness witness and they were
that claim for the reason that it is not true as to the fact
registered as a witness, as was said in the statement, as well
and he called to show that the witness was a test witness, as well
that he was called before as a test witness witness in a trial
for the purpose of the jury, and was not registered, as would not
however, his alleged statement being illegal and in violation
of the statute.

Section 1 of Chapter 17, "as was in violation of
the defendant, registration and registration of test witness witness
and test witness witness, is from July 1, 1911, provided is
not, as follows:

" That on and after January 1, 1933, it shall be unlawful for any person to act as a real estate broker, or real estate salesman, or to advertise or assume to act as such real estate broker or real estate salesman, without a certificate of registration. * * * It shall be unlawful for an association * * * to engage in the business * * * of real estate broker or real estate salesman, unless every member or officer * * * shall hold a certificate of registration as a real estate broker, and unless every employee who acts as a salesman * * * shall hold a certificate of registration as a real estate salesman."

Section 3 of the act provides as follows:

"A real estate salesman within the meaning of this act is any person who for a compensation or valuable consideration is employed either directly or indirectly by a real estate broker * * * to sell, or offer to sell, or to buy or to offer to buy, or to negotiate the purchases or sale or exchange of real estate, or to lease or offer to lease, to rent or offer for rent any real estate, or to negotiate leases thereof or of the improvements thereon."

Section 4, which describes the certificate to be issued, is as follows:

"This certificate shall show the name and address of the applicant, and in case of a real estate salesman's certificate, shall show the name of the real estate broker by whom he is employed * * * The certificate of each real estate salesman shall be delivered or mailed to the real estate broker by whom such real estate salesman is employed, and shall be kept in custody and control of such broker."

Section 5 provides:

"When any real estate salesman shall be discharged, or shall terminate his employment with the real estate broker by whom he is employed,"

his certificate shall be surrendered.

Section 6 provides that the revocation of a broker's certificate shall

" automatically suspend any real estate salesman's certificate granted to any person by virtue of his employment by the broker whose certificate has been revoked."

Section 7 provides as follows:

"It shall be unlawful for any real estate salesman to accept a commission or valuable consideration

1. That on and after January 1, 1961, it shall be the policy of the Government of the United States to encourage the development of a free and open world economy and to support the efforts of the United States and other nations to achieve this goal.

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10. "I am not a Jew, I am a Jew."

Journal of Management Inquiry 22(1) 1-12

Abstracts of the following papers were presented:

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for the performance of any of the acts herein specified from any person, except his employer, who is a real estate broker, must be registered under the provisions hereof."

Section 8, g, makes it a cause for revocation of a broker's license if he is guilty of "paying a commission or valuable consideration to any person for acts or services performed in violation of this act."

It will be observed that Section 8, which defines a real estate salesman as "any person who for a compensation or valuable consideration is employed, either directly or indirectly, by a real estate broker to sell real estate," applies to the plaintiff, because it is the claim of the plaintiff that he was employed by the defendants as real estate brokers "either directly or indirectly" to sell the property in question. It follows, therefore, that the defendants were entitled to introduce the evidence which they offered, in an endeavor to show that the plaintiff did not have a license from the City and was not registered with the State under the statute; and further, that he was a real estate broker prior to February 14, 1927, and engaged in that business. If such evidence had been introduced and the record disclosed that he was a real estate salesman, or a real estate broker, and that he was not authorized under the law to act as a real estate salesman or a real estate broker, in the transaction in question, then it would follow that he was not entitled to the compensation for which he sued.

Apparently, under the statute there is no such thing as a suit by a salesman "against the owners of the property to recover commissions." A real estate salesman's relations

Especially, during the winter there is no work
being done as a result of a "winter" period of the year.
city to receive assistance. A local estate administrator's office

are necessarily with his employer. Just as here, the plaintiff was employed by the defendants, real estate brokers, and came directly under the terms of Section 2, and if the evidence showed that he was a real estate salesman and was not registered as a salesman, had no certificate, he could not recover.

Under the Jarusz case, supra, the only time a salesman would ever be required to have a certificate would be when he was employed directly by an owner. That, however, we do not think consonant with the meaning of the statute, as in that situation, he would be not only a real estate salesman, but a broker under the act, and would need, accordingly, a broker's license.

In our opinion, no one who acts as a real estate salesman for an employer who is a registered real estate broker is entitled to recover from such employer for his services unless he himself has obtained a certificate of registration as a real estate salesman.

Counsel for the plaintiff cite Gibbons v. Williams, Monicer & Company, 191 Ill. App. 594, and Gross v. Straus, 208 Ill. App. 263, but both of these cases involve the law as it existed prior to July 1, 1921, when the act in relation to the definition of Real Estate Broker and Real Estate Salesman went into effect.

In our judgment, the defendants should have been allowed to put in evidence undertaking to show that the plaintiff had acted in more than one instance as a broker; to show what efforts he had made, what work he had done in that line, to what extent, as a whole or partial vocation, he had been engaged in selling or offering for sale, buying or offering to

buy, or undertaking negotiations for the purchase, sale, rental, or exchange of real estate; or to show that he was a real estate broker prior to February 14, 1927, when the alleged "deal" was made; to show that he was either a real estate salesman, or a real estate broker, and did not have a license from the City, and that he was not registered in the Illinois Department of Registration and Education to engage in the real estate business as provided by Chap. 17 a, entitled, "Real Estate Brokers and Salesmen."

For the reasons stated, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

HOLDOM, P.J. AND WILSON, J. CONCUR.

boy, an interesting explanation for the absence, and, finally,
of course, of that report of the day that he was a real paper
right first in February 1907, when the "Daily Mail"
was made to know that he was a little boy, and not a
boy, and that he was not mentioned in the British newspaper
of explanation and information in regard to the real state
business as carried by the "Daily Mail", that state
business and business.

For the reason stated, the judgment will be

reversed and the case remanded.

REVEREND AND THE COURT.

REVEREND, J. J. WALKER,

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250 I.A. 629

ISAAC B. ABRAHAM,

Plaintiff in Error,

v.

THOMAS E. WILSON & COMPANY
and ILLINOIS PUBLISHING &
PRINTING COMPANY,

Defendants in Error.)

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

Opinion filed October 3, 1928

MR. JUSTICE WILSON delivered the opinion of
the court.

Plaintiff Isaac B. Abraham, filed his declaration in the Superior Court, charging that on May 30, 1923, the defendants Thomas E. Wilson & Company and Illinois Publishing & Printing Company were in charge and control of a certain aeroplane and that the same was being operated in the City of Chicago, Cook County, Illinois, and that by reason of its negligent management and operation by the defendants, it was caused to and did run or fly against the plaintiff, as a result of which plaintiff was greatly injured, etc.

The cause was reached for trial May 6, 1926, and the court instructed the jury to return a verdict in favor of the defendants and against the plaintiff for costs of the proceeding. Motion for a new trial was made and overruled and judgment entered on the verdict and a motion in arrest of judgment was overruled. Thereupon, plaintiff prayed an appeal to the Appellate Court which was allowed upon his filing a bond in the sum of \$250 and bill of exceptions within sixty days from the date of the judgment.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 84

Opinion filed October 6, 1991

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June 28, 1927, over a year after the entry of the judgment, a motion was made asking the trial court to approve a stenographic report of the trial and, in support of said motion, an affidavit was filed alleging in fact that the affiant believed that there was error in the trial of the case and that the plaintiff had been unable to furnish a transcript of the testimony and a report of the trial proceedings within the time fixed by the court because of his inability to raise sufficient funds. A motion to have the bill of exceptions presented, signed and filed nunc pro tunc as of the date of the presentation, which was June 28, 1927, was overruled by the trial court and to this ruling plaintiff excepted and is now here in this court on a writ of error to that ruling.

There appears to be but one question involved and that is whether it was the duty of the trial court to permit the filing of the transcript of evidence and to have signed and sealed it, so that it might become a bill of exceptions in said cause.

The term at which the cause was heard and judgment entered, had passed, and the time granted within which to file the bill of exceptions and the bond had also expired, so that the court was without jurisdiction to enter an order permitting the filing of the bill of exceptions.

It is not alleged that there was any error of record upon which to base this motion, other than the error committed upon the trial, which should have been contained in the bill

On the 15th of June, 1897, there was a meeting of the
 Board, and a motion was made to amend the bill. It was
 then moved to amend the bill by striking out the
 words "and the said bill" and inserting in their
 place the words "and the said bill" and the words
 "and the said bill" and the words "and the said bill".
 The motion was carried, and the bill was amended
 accordingly. The bill was then read a second time,
 and the words "and the said bill" were inserted
 in the bill. The bill was then read a third time,
 and the words "and the said bill" were inserted
 in the bill. The bill was then passed.

The bill was then passed, and the words "and the
 said bill" were inserted in the bill. The bill was
 then read a second time, and the words "and the
 said bill" were inserted in the bill. The bill was
 then read a third time, and the words "and the
 said bill" were inserted in the bill. The bill was
 then passed.

The bill was then passed, and the words "and the
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 then read a second time, and the words "and the
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 then read a third time, and the words "and the
 said bill" were inserted in the bill. The bill was
 then passed.

of exceptions itself. The courts of this State have repeatedly held that the trial court had lost jurisdiction to enter any order in a cause after the term had gone by and after the time fixed for the filing of the bill of exceptions.

People v. Ellsworth, 261 Ill. 275;
Richter v. Chicago & Erie R.R. Co., 273 Ill. 625;
Plesser v. Minkota Milling Co., 222 Ill. 139;
Peter Hand Brewing Company v. Mauseada, 210 Ill.App.153;

It is argued on behalf of counsel for the plaintiff that plaintiff has a right to have his cause reviewed on a writ of error and, with this, we agree. But, in the absence of a bill of exceptions, we have nothing to consider except the common law record and cannot supply the bill of exceptions as requested by counsel.

The Supreme Court in the case of People v. Irwin, 263 Ill. 51, in its opinion says:

"The record shows the bill of exceptions was never presented to respondent within the time originally fixed for presenting and filing the bill of exceptions, and no application was ever made during any term of court, before the time fixed for filing the bill of exceptions had expired, for a further extension of time, and, where that is so, a judge cannot be compelled, after the time fixed has expired, to sign the bill of exceptions and order it filed quac pro tunc as of a date previous to the expiration of the time fixed for presenting and filing the same."

In the absence of the bill of exceptions we cannot say that the trial court committed reversible error on the trial of the cause.

For the reasons stated in this opinion the order of the Superior Court denying the motion to approve the stenographic report of trial is affirmed.

HOLDOM, P.J. AND TAYLOR, J. CONCUR.

ORDER AFFIRMED.

of operations itself. The number of these plants have recently held that the plant would not have participated in either any order in a manner which was not done by and with the same thing for the filling of the bill of materials.

1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 26

It is argued on behalf of counsel for the plaintiff that plaintiff has a right to have his name removed as a result of error and, with this, we agree. But, in the absence of a bill of exceptions, we have nothing to consider except the common law record and cannot modify the bill of exceptions as suggested by counsel.

[illegible]

1970 10/10/70 11/11/70 12/12/70

"The report shows the bill of exchange was
cover presented in London and after the bill was
issued the bank was closed and the bill of exchange
and on account of the bill being not paid
worth, before the time for the bill was due to
expire, but a certain amount of
time, and, that is all, a bank would be
closed, after the time fixed for the bill was
due to expire and the bank is still open and
as a bank provides so the bill is still
closed for London and the bill is still open."

Source: by author from 1990 and by original and all

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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7. 1994-1995 1000 2000 3000 4000 5000 6000 7000 8000 9000 10000

THE SECRETARY OF THE ARMY

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... ..

J. C. LEVIN, doing business
as J. C. LEVIN & COMPANY,

Appellee,

v.

A. L. FELDMAN, L. H. FELDMAN
and M. FELDMAN, doing business
as FELDMAN BROTHERS,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed October 3, 1928

MR. JUSTICE WILSON delivered the opinion of the
court.

This is an action based upon an account for goods sold and delivered from January 5, 1926 to February 20, 1926, inclusive. The total bill was for \$2,761.25, showing a credit of \$2,576.21, for merchandise returned and cash, leaving a balance of \$185.04. This balance appears to be made up of a claim for 8% discount on the merchandise delivered and the value of one fur coat still in the possession of the defendants. The trial court without a jury found the issues in favor of plaintiff Levin and entered judgment in his favor for \$185.00. It appears from the evidence that, on March 10, 1926, about two months after the date of the first payment, the defendants sent a check to the plaintiff for \$584.66, on the back of which was the statement, "in full settlement of account as per statement attached." This check was returned by the plaintiff, together with a statement showing the amount claimed to be due and later another check was sent to the plaintiff, on the back of which was the same notation, "in full settlement of account as per statement attached", as was endorsed on the previous check. This was accepted and suit subsequently brought for the balance

J. W. LIVING, being examined,
as J. W. LIVING & COMPANY,
Attorneys,

VERGIL LIVING
JAMES LIVING
JOHN LIVING

J. W. LIVING, J. W. LIVING
and J. W. LIVING, being examined,
as J. W. LIVING & COMPANY,
Attorneys,

Witness their hands and seals this 1st day of

1911, at the City of New York.

Done.

This is an action brought upon the contract for goods sold and delivered from January 1, 1910 to December 31, 1910. The total bill was for \$1,750.00, showing a credit of \$2,500.00. The merchandise returned was worth, showing a balance of \$1,750.00. This balance appears to be made up of a check for \$500.00 on the merchandise delivered and the value of the goods sold in the possession of the defendant. The total credit appears to have been in favor of the plaintiff from his return judgment in his favor for \$1,750.00. It appears that the witness here, on each of the 12th, 19th and 26th days of the month of May 1911, the witness here, the defendant and a third to the plaintiff for \$1,750.00, on the 12th of May 1911. The statement "in full settlement of account as per contract attached." This check was returned by the plaintiff, together with a statement showing the account claimed to be due and paid. Another check was sent to the plaintiff, on the 12th of May 1911, and the same statement, "in full settlement of account as per contract attached." In the statement on the reverse side.

This was supplied and was subsequently brought for the balance

claimed to be due. It is insisted on behalf of the defendant that the acceptance of the check constituted an accord and satisfaction and that the defendants were released from any further obligation on said account. It is urged on behalf of the plaintiff that the account was a liquidated account and there was no bona fide dispute between the parties upon which an accord and satisfaction could be based. The rule appears to be well settled in this State that where there is a bona fide dispute between the parties and the account in question is unliquidated that the acceptance of a check for a lesser amount than that claimed will amount to an accord and satisfaction.

The written terms of the sale as contained in the statement attached to the bill of goods provided that no discount would be allowed. Defendants sought to vary the terms of this instrument by showing that Levin, an agent of the plaintiff, made such an agreement with the defendants at the time of the sale as to the claimed 8% discount.

Testimony was introduced by both sides on this question and it became one of fact. As to the fur coat which defendants claimed the right to return, evidence was introduced on behalf of the plaintiff to the effect that when a certain coat was shown them as being the one in question, it developed that it did not belong to the plaintiff. And, it is argued that the coat in question was sold by the defendants and that they did not have such a coat as that claimed to have been purchased from the plaintiff and which the defendants claimed the right to return.

claimed as his own. It is insisted on behalf of the defendant
that the assignment of the above described real estate was
not a mortgage and that the defendant was not bound by the
provisions of the mortgage as to the property. It is urged in support
of the plaintiff that the mortgage was a limited mortgage
and that there was no such thing as a mortgage between the parties
which as a mortgage and satisfaction would be made. The only
question to be asked is this: What was the effect of the
assignment of the property to the plaintiff and the mortgage to
the defendant? It is contended that the assignment of a mortgage for a
limited amount does not bind the plaintiff as to the amount and
satisfaction.

The effect of the assignment of the mortgage to the
plaintiff is stated in the bill of particulars that the
assignment was made to the plaintiff for the purpose of the
defendant being able to pay the mortgage. It is urged in support
of the defendant that the assignment was made for the purpose
of the plaintiff being able to pay the mortgage at the time
of the assignment and that the assignment was made for the purpose
of the plaintiff being able to pay the mortgage at the time
of the assignment.

Defendant was informed by the plaintiff in the
assignment that it was made for the purpose of the
defendant being able to pay the mortgage. It is urged in support
of the plaintiff that the assignment was made for the purpose
of the plaintiff being able to pay the mortgage at the time
of the assignment and that the assignment was made for the purpose
of the plaintiff being able to pay the mortgage at the time
of the assignment. It is urged in support of the plaintiff
that the assignment was made for the purpose of the plaintiff
being able to pay the mortgage at the time of the assignment
and that the assignment was made for the purpose of the plaintiff
being able to pay the mortgage at the time of the assignment.

The memorandum on the back of the invoice also contained a provision that no claims would be allowed or returns accepted after three days after the receipt of the goods and this, together with the oral testimony introduced at the trial, constituted a question of fact relating to the proposition as to whether or not there was a bona fide dispute. The rule is well stated in the case of Teague v. John E. Burns Lumber Co., 187 Ill. App. 225, where the court in its opinion says:

"It is undoubtedly true that the law of this State as laid down by its highest tribunal in a long line of cases, of which Ostrander v. Scott, 161 Ill. 339; Lapp v. Smith, 183 Ill. 179; Canton Union Coal Co. v. Parlin & Orendorff Co., 215 Ill. 244; and Snow v. Griesheimer, 220 Ill. 106, are but examples, is that where there is a bona fide dispute between a debtor and creditor as to a portion of a claim made by the creditor, and the debtor sends to the creditor payment of the sum he admits to be due, with the expressed or implied condition that it is to be accepted as payment in full or returned, there is an accord and satisfaction if the creditor retains it, and the creditor cannot thereafter recover the balance he claims to be due. This carries the doctrine of accord and satisfaction farther than the law in most other jurisdictions does. * * * * *

To the first of these questions our answer is affirmative. Although we do not find in the decisions in our own State any directly in point, we think, in reason, that the existence of bona fides in the dispute on the part of the debtor in such cases is a question of fact, and as such belongs to the jury to decide. It cannot be that a debtor shows such good faith merely by asserting it."

In the case at bar the case was tried by the court without a jury and every intendment should be indulged in favor of the correctness of its findings. This court cannot say, as a matter of fact, that the question of bona fides is so manifestly in favor of the defendants that it should set aside the finding of the trial court on that ground.

For the reasons stated in this opinion, the judgment of the trial court is affirmed.

HOLDOM, P.J. AND TAYLOR, J. CONCUR.

AFFIRMED.

32667

250 I.A. 629³

M.W. PADWAY, trading as
M.W. PADWAY & SON,

Appellee,

v.

ISSAC TUCKER, trading as
I. TUCKER & CO.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed October 3, 1928

MR. JUSTICE WILSON delivered the opinion of the court.

This is an appeal from a judgment in favor of the plaintiff, M. W. Padway, trading as M. W. Padway & Son, against the defendant, Issac Tucker, trading as I. Tucker & Co., for the sum of \$500. The cause was heard by the trial Judge without a jury and from that judgment this appeal was perfected to this court.

The statement of claim is for goods and merchandise sold and delivered by the plaintiff to the defendant. The affidavit of defense denies the indebtedness and charges that the plaintiff agreed to deliver 244 sheep lined vests, but failed so to do and, instead, delivered a number of vests which were leather lined and which were not ordered or purchased from the plaintiff and were returned.

The plaintiff Padway on the trial testified that he had a talk with Tucker, the defendant, about certain coats and that on Thursday morning he called with the coats and delivered them and told him that it was a job lot and took them out of his car and took them in to the defendant's place of business and that they thereupon agreed on a price of \$4.00 per garment and that the total bill amounted to \$976.00 and that on the next day he received from the defendant a check for \$476.00 on account.

On behalf of the defendant, one Otto S. Lyng testified that he was employed by the defendant as a salesman and that the plaintiff submitted samples of the vests to him in April of 1924, and that he discussed with the plaintiff the question of the delivery of the coats on several occasions prior to the delivery. He testified further that the plaintiff delivered the merchandise on Sunday and the boys were not working so that the goods could not be inspected. Testified further that plaintiff stated he needed some money for his payroll and Mr. Tucker said he would make out a check for \$476.00, leaving a balance of \$500 subject to the approval of the merchandise. Testified further that the goods were not all sheep lined and that about one third were soiled and lined with split leather and other materials.

Certain correspondence between the parties was introduced in evidence from which it appears that the defendant was seeking to abrogate the sale on the ground contended in a communication of April 11, 1924, viz., that it did not seem that the defendant would be able to use these garments. It is insisted on behalf of the plaintiff that the sale was a completed sale of a job lot and, therefore, not divisible, and that they were purchased at the time subject to inspection and that the next day a check was paid on account and that this payment constituted an account stated.

It is insisted on behalf of the defendant that they were received subject to inspection and that after the inspection they were rejected and that, therefore, the defendant was not liable for the rejected merchandise.

On receipt of the statement, the date of the report

that the report was made by the statement of a witness and

that the statement was made by the witness in his

April of 1918, and that he himself with the statement and

that of the delivery of the goods in several instances

to the delivery. The statement further that the statement

that the statement is made by the witness and that

that the goods were made by the witness. The statement

plaintiff stated by the witness that the goods were

Yonkers said he could not see a check for \$100.00, January 2

balance of \$100 subject to the receipt of the statement.

Yonkers further that the goods were made by the witness

that the goods were made by the witness and that the

and other matters.

On the 10th of January, 1918, the witness

statement in which it is stated that the witness

was stating to the witness that the goods were made by

communication of the witness, the witness said that

the statement would be made by the witness. It is

stated on receipt of the statement that the goods were

made by a person named, the witness, and that the

were purchased of the witness in January and that the

next day a check was paid to the witness and that the

statement was made.

It is stated on receipt of the statement that the

was stated subject to the statement and that the

that the goods were made by the witness, the witness

was made by the witness.

The question involved is one purely of fact and the trial court had the advantage of seeing and hearing the witnesses and weighing the testimony offered on behalf of both parties. The trial court evidently was of the opinion that the delivery was a job lot and that the price was agreed upon after inspection and that there was a payment on account on the following day and that the defendant had a full opportunity to have rejected before payment. There is evidence to support this view and we find no reason for disturbing the finding of the trial court.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

AFFIRMED.

HOLDEN, P.J. AND TAYLOR, J. CONCUR.

The question involved is one purely of fact and the

trial court had the advantage of seeing and hearing the wit-

nesses and weighing the testimony offered on behalf of each

party. The trial court's testimony was of the nature that the

defendant was a Jew and that the victim was a Jew and after

consideration and this there was a request to submit to the jury

and they said that the defendant was a Jew and accordingly he was

rejected before judgment. There is evidence to support this view

and on this we reverse for mistaking the finding of the trial

court.

For the reasons stated on this record the judgment

of the municipal court is affirmed.

ATTORNEY.

REVEREND, J. J. JAMES, J. JAMES.

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H. BARKMANN CARTAGE CO.,
a corporation,

Plaintiff in Error,

v.

ELIZABETH LOHR,

Defendant in Error.

APPEAL TO

CIRCUIT COURT,

COOK COUNTY.

Opinion filed October 3, 1928

MR. JUSTICE WILSON delivered the opinion of the court.

This case comes to this court upon a writ of error to the Circuit Court of Cook County to review a judgment in favor of Elizabeth Lohr, plaintiff, against H. Barkmann Cartage Co., a corporation, defendant. The case was tried before a jury and resulted in a verdict of \$4,200 in favor of the plaintiff and upon this verdict judgment was entered, to the entry of which judgment the defendants excepted.

The declaration charged that the plaintiff was injured by reason of the negligent manner in which a certain automobile truck owned by the defendant, H. Barkmann Cartage Co., was managed and operated. Charges further that the plaintiff was at the time of the accident in the exercise of due care for her own safety and that the truck, at the time of the accident, was under the control and management of Ralph Schweinzen who was a servant and agent of the defendant. During the course of the trial, the defendant Schweinzen was dismissed out of the action and the cause was continued as to H. Barkmann Cartage Co., a corporation, as the sole defendant. No point is made by defendant as to the pleadings nor is it insisted that the driver Schweinzen was not guilty of negligence at the time of the

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Opinion filed October 3, 1988

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NOTES: 1. The above information was obtained from the records of the FBI, New York Office, dated 10/10/68.

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THESE ARE THE SAME SUBJECTS AS IN THE PREVIOUS CASE AND ARE REPRODUCED

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accident nor that the plaintiff was not in the exercise of due care and caution for her own safety.

Two points are urged as ground for reversal of this judgment: First, that the driver of the truck, Schwinnen, at the time of the accident, was not acting within the scope of his employment; second, that the trial court erred in admitting the testimony of two witnesses concerning a conversation between Barkmann, President of the defendant company, and the driver Schwinnen at a certain police station in the City of Chicago after the accident had occurred.

From the facts and circumstances in evidence, it appears that, on October 2, 1924, about 8:00 o'clock in the evening, the plaintiff, Elisabeth Lehr, and her sister, Georgia Emily Lehr, had started to cross Lincoln Avenue from the southwest corner and had taken one step off the sidewalk when the truck in question, driven by said Schwinnen, turned the corner of Lincoln Avenue in a southeasterly direction and struck the plaintiff. The truck continued on, but a police officer climbed over the tail gate and forced Schwinnen to stop the truck and then arrested him, taking him to the North Robey street police station. It appears further from the testimony that Henry Barkmann was the president of the H. Barkmann Cartage Co., defendant, and that the company did a teaming and hauling business for the Clark Coal Company; that Barkmann arrived at the garage where the truck was kept about 5:00 o'clock in the evening, but Schwinnen, the driver, had not returned with the truck. Thereupon he sent his son out to make a search for it. It appears further that Kelsey, an employee of the defendant company, had directed Schwinnen, between 3:00 and 4:00 o'clock in the afternoon to take the truck to the garage. It also

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appears from the testimony that Schwinnen, on the day in question, was on the payroll of the defendant company and that the truck was the property of the defendant and bore on its side, the words: "H. Barkmann Cartage Co."

It appears that Robert Barkmann, son of the president of the company, drove around the neighborhood where they thought the truck might be and discovered it on Fullerton avenue, but that Schwinnen was not on the truck and it was in the possession of two strangers; that he turned off the switch of the truck and directed his companion, a man named Buspen, to watch it and then went into a garage to telephone his father. When he came out the truck was gone and they again searched for it and found it near the corner of Greenview and Olybourne avenue and that at this time Schwinnen was driving it. Robert Barkmann asked him where he was going and he said to the garage and that they thereupon followed the truck, but when it came to the corner of Cortlandt and Olybourne streets, there was a railroad track across the street and freight cars were being operated over the crossing; Schwinnen drove to the east side of the street and cut around the train and the witness Barkmann was not able to get by and again lost the truck.

It appears further from the testimony that, about 8:00 o'clock of the same evening, Henry Barkmann, president of the defendant company, was notified at his home that Schwinnen was locked up at the Robey street police station and thereupon proceeded to that place, arriving there about 8:30, at which time he had the conversation with Schwinnen which was admitted in evidence and assigned as error in this proceeding.

Martin Mullen, a witness called on behalf of the defendant, testified that he was a captain of police, stationed at the police station in question, and that he had a conversation with Schwinnen and that he told him he was delivering coal and went to his mother's home, where he had supper, and that he picked up the two men and they had a drink and that he was on the way to meet some girls at the time of the accident. The evidence does not show that Schwinnen was intoxicated.

To the declaration filed in this cause the defendant filed a plea of the general issue and a special plea, denying that it was possessed of, operating, or managing the truck in question at the time of the accident; charging further that the driver of the truck at the time of the accident was not then and there the servant of the defendant.

This plea placed the burden of proving agency upon the plaintiff, but the facts ascertainable from the evidence so clearly indicate agency on the day in question, that the presumption of agency continues up to and including the time of the accident, unless this presumption is overcome by evidence sufficient on the part of the defendant.

When the facts became established that the truck in question was the truck of the defendant company and that Schwinnen was on the payroll of the defendant on the day in question and was directed to return the truck to the garage, the plaintiff had made out a prima facie case of agency and it is presumed this agency continued to and including the time of the accident. It devolved upon the defendant to show that the agency was terminated or that the servant at the time was not acting within the scope of his employment. Kavale v. Norton Salt Co. 329 Ill. 445.

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(continued from page 6)

Journal of Management Education 30(6)p.709-728

The question as to whether or not the driver of the truck was serving his master at the time of the accident was a question for the jury and from the facts in this case we can not say, as a matter of law, that the verdict is so manifestly against the weight of the evidence that it would necessitate a reversal of the judgment on that ground. It is strenuously urged that the court was in error in admitting a conversation between Barkmann, the president of the defendant company, and Schwinnen, the driver of the truck, at the police station, which took place at approximately 9:00 o'clock in the evening of the day of the accident. Two witnesses on behalf of the defendant were permitted to testify that, at the police station, they heard Barkmann ask Schwinnen where he had been with the truck and that he, Schwinnen, stated that he had delivered a load of coal at 4:45 P.M. and that he had lost his magneto pencil and had walked back to Leavitt street for a new one. It is urged as error that the statement of Schwinnen was inadmissible: First, because it was an attempt to establish agency by the agent, after the agency had terminated; and second, that it was an attempt to establish liability by a statement of the agent after the accident. As to this last objection, the statement admitted had no bearing on the question of liability and, on that ground, would therefore not be objectionable.

As to the objection urged that it was an attempt to establish agency by a statement of the agent, it appears from the record that the witness Mullen, the police captain at the Hobey street station, was interrogated by counsel for the defendant, at or about the same time and at the same place in regard to statements made by Schwinnen and that this witness, on direct examination, testified to questions put by him to Schwinnen and answers

of Schwinnen to these questions as to the manner in which the accident happened and as to facts concerning what he was doing at the time of the accident and prior thereto. If for no other reason, the defendant would be precluded from objecting to this line of interrogation where defendant, itself, had adopted a similar line of interrogation and questioning of its own witness and concerning statements made by Schwinnen for the purpose of eliciting information to show that Schwinnen at the time of the accident was not in the employ of the defendant, nor acting within the scope of his employment. Moreover, as we have already stated, the statement of Schwinnen was elicited by questions put to him by the president of the defendant company, and if they tend to prove agency, the defendant could have no ground to object because of that fact where the declarations were brought about by the act of the defendant through its principal officer. Moreover, under the rule that the agency having been once established the presumption continues, the plaintiff was entitled to have his theory of the case presented to the jury by showing that the delay in returning the truck to the garage was caused by the loss of the magneto pencil, which, it is admitted, was vitally necessary in the operation of the truck.

Plaintiff's theory of the case was that Schwinnen was, at all times, during the day in question, up to the time of the accident and thereafter, the agent of the defendant. Defendant's theory of the case was that the agency terminated prior to the time of the accident. Each side was entitled to present evidence to sustain its theory of the case and the testimony should be admitted, properly safeguarded by proper instructions. No objection appears in the record to be made on

account of the giving or refusing of instructions and we are of the opinion that the testimony was admissible.

For the reasons stated in this opinion, the judgment of the Circuit Court is affirmed.

AFFIRMED.

HOLDEN, F.J. AND TAYLOR, J. CONCUR.

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SAM ANDREWSON, ALFRED SAMSON and
CHARLES NIELSEN, co-partners do-
ing business as ANDREWSON FURNI-
TURE COMPANY,

Appellants,

v.

CARL SANDERS and HARRIET SANDERS,

Appellees.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

Opinion filed October 3, 1928

MR. JUSTICE WILSON delivered the opinion of
the court.

The statement of claim filed in this case charges that the plaintiffs, Sam Andrewson, Alfred L. Samson and Charles Nielsen, co-partners, doing business as Andrewson Furniture Company, sold and delivered to the defendants, Carl Sanders and Harriet Sanders, his wife, certain furniture and household articles at their instance and request and that, after allowing all proper credits, there was due upon said account the sum of \$390.05. Service was had upon the defendant, Harriet Sanders, and returned "Not Found" as to the defendant, Carl Sanders. To this statement of claim Harriet Sanders filed her certain amended affidavit of merits, charging that she directed the plaintiffs to repossess said furniture, but that the plaintiffs refused so to do and notified the defendant, Harriet Sanders, that they had adjusted the matter with the defendant, Carl Sanders, who had promised to pay the entire account and that the plaintiffs would not make any claim against her,

Opinion filed October 3, 1981

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The case was tried before a jury and resulted in a verdict finding the issues in favor of the defendant and against the plaintiffs. Motion for a new trial was overruled and judgment entered on the verdict, from which judgment this appeal is perfected.

From the facts it appears that the defendants, Carl Sanders and Harriet Sanders, were husband and wife and the claim against the defendant here is based upon the statutes providing that the expenses of the family shall be chargeable upon the property of both husband and wife, or either of them, in favor of creditors.

It appears that at the time of the purchase of said furniture, the said defendants were living together, but, that later, they separated and the defendant here instituted proceedings for divorce and informed the plaintiffs to that effect.

It is stipulated by counsel that the value of the property delivered and unaccounted for amounted to \$370. It appears further that the parties, plaintiffs and defendant, knew of the separation and that the defendant here, Harriet Sanders, requested the plaintiffs to get their money from her husband and further informed the plaintiffs that she had prospective purchasers for the property and she would see that they got their money if the property was turned over to her. She stated further in her testimony that she had a later conversation with Mr. Andrewsen, one of the partners, and he informed her that satisfactory arrangements had been made and that Mr. Sanders desired to use the apartment and the furniture and would see that the payments were made promptly and that it

The same was tried before a jury and resulted in a verdict finding the issue in favor of the defendant and against the plaintiff. Again the same trial was conducted and judgment entered in the verdict, from which judgment this appeal is brought.

From the facts it appears that the defendant, Earl Sanders and United Lumber, were partners and wife and the claim against the defendant was in favor of the plaintiff provided that the property at the time shall be considered upon the property of both husband and wife, at death of Earl, in favor of creditors.

It appears that at the time of the purchase of said furniture, the said defendant were living together, and, that later, they separated and the defendant have continued to live apart for some time and returned the plaintiff in that event.

It is submitted by counsel that the value of the property delivered and transported for amount of \$1200. It appears further that the parties, plaintiff and defendant, knew of the separation and that the defendant party, Earl Sanders, requested the plaintiff to get their money from the books and further informed the plaintiff that the said prospective partnership for the property was the same and that they got their money at the property was around \$1000. She stated further in her testimony that she was a later partner with Mr. Sanders, one of the partners, and in the event her share of the partnership was paid back and that Mr. Sanders desired to use the partnership and the furniture and would not that the partnership was properly and that it

was all right with him and that he saw no reason for taking the furniture, so long as the payments had been made promptly up to date. She testified that Mr. Andrewson told her that he had consented to the removal of the furniture by Mr. Sanders from 1040 Rosemont avenue to Mason avenue. It is apparent that the defendant, Carl Sanders, has since disappeared and the furniture has been lost. This conversation was in August or September and she had no further conversation with him, nor did she hear anything about the matter, until March of the following year.

It is insisted that there was no valuable consideration moving from the defendant, Harriet Sanders to the plaintiffs, to sustain her position that the plaintiffs had released her from obligation. This question was properly presented to the jury for their consideration and they found in favor of the defendant, and we see no reason for disturbing their verdict.

In refusing to repossess the furniture and permitting the defendant, Carl Sanders, to remove it and denying the defendant here an opportunity to take the furniture and pay for the same, the plaintiffs deprived the defendant of a valuable right and by their conduct are estopped from proceeding against her on the account set out in their statement of claim. Plaintiffs were fully aware of the facts and circumstances existing at the time and, by looking to the defendant, Carl Sanders, elected not to proceed against the wife.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

AFFIRMED.

HOLDOM, F.J. AND TAYLOR, J. CONCUR.

and all right with him and that he was no longer for selling
the furniture, as long as the furniture had been sold through
up to date. The fact that the furniture had been sold
had amounted to the removal of the furniture by the furniture
from 1944 according to the records. It is important
that the defendant, Earl Browder, had since disappeared and
the furniture had been lost. This conversation was in regard
or Browder and the fact no further conversation with him
not did she hear anything about the matter, until March of
the following year.

It is stated that there was no further con-
versation moving from the defendant, Earl Browder, to
the plaintiff, in relation to the furniture. This conversation was generally
had between her and Browder. This conversation was generally
presented to the jury for their consideration and they found
in favor of the defendant, and we see no reason for disbe-
lieving their verdict.

In order to present the plaintiff and defendant
the defendant, Earl Browder, to present to the jury the de-
fendant has an opportunity to file his testimony and say for
himself. The plaintiff believed the defendant of a violation
rights and his rights occurred and occurred from proceeding against
her on the account not on the basis of rights. Their
rights were fully aware of the facts and circumstances existing
at the time and, by failing to file testimony, Earl Browder,
elected not to proceed against the wife.
For the reasons stated in this opinion, the defendant

OF LUXE MOTOR CAR CO., a corporation,
JOSEPH F. DE CHAFF and
WILLIAM WINKEL,

Appellees,

v.

WILLIAM E. BEVER, Mayor of the
City of Chicago, FRANCIS X. BUNCH,
Corporation Counsel of the City
of Chicago, MORGAN A. COLLINS,
Superintendent of Police of the
City of Chicago, JAMES I. MCCARTHY,
Assistant Corporation Counsel of
the City of Chicago, LT. JAMES J.
KILLSACKY, Secretary of the Public
Vehicle License Commission of the
City of Chicago,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

OPINION PER CURIAM.

Appellants filed herein their motion for leave
to file reply brief. Appellees have filed counter suggestions
in opposition thereto and also a motion to dismiss the appeal
pro forma.

The record shows that this cause came before us
on an appeal by the defendants, William E. Bever, Mayor of
the City of Chicago, Francis X. Bunch, Corporation Counsel
of the City of Chicago, Morgan A. Collins, Superintendent of
Police of the City of Chicago, James I. McCarthy, Assistant
Corporation Counsel of the City of Chicago, Lt. James J.
Killsacky, Secretary of the Public Vehicle License Commission
of the City of Chicago, from a decree issued out of the Cir-
cuit Court of Cook County by virtue of which the defendants

THESE ARE THE RESULTS OF THE
ANALYSIS OF THE SAMPLES
OBTAINED FROM THE SITE

ANALYSIS

THE ANALYSIS OF THE SAMPLES
OBTAINED FROM THE SITE
HAS REVEALED THE FOLLOWING
RESULTS: THE SAMPLES
CONTAIN A HIGH PERCENTAGE
OF SILICA, WHICH IS
CONSISTENT WITH THE
NATURE OF THE MATERIAL
OBTAINED FROM THE SITE.
THE ANALYSIS ALSO
REVEALED THE PRESENCE
OF A SMALL AMOUNT OF
IRON, WHICH IS
CONSISTENT WITH THE
NATURE OF THE MATERIAL
OBTAINED FROM THE SITE.

ANALYSIS

THE ANALYSIS OF THE SAMPLES

REVEALED THE FOLLOWING RESULTS:

THE SAMPLES CONTAIN A HIGH PERCENTAGE OF SILICA, WHICH IS CONSISTENT WITH THE NATURE OF THE MATERIAL OBTAINED FROM THE SITE.

THE ANALYSIS

REVEALED THE FOLLOWING RESULTS:

THE SAMPLES CONTAIN A HIGH PERCENTAGE OF SILICA, WHICH IS CONSISTENT WITH THE NATURE OF THE MATERIAL OBTAINED FROM THE SITE. THE ANALYSIS ALSO REVEALED THE PRESENCE OF A SMALL AMOUNT OF IRON, WHICH IS CONSISTENT WITH THE NATURE OF THE MATERIAL OBTAINED FROM THE SITE.

THE ANALYSIS OF THE SAMPLES REVEALED THE FOLLOWING RESULTS: THE SAMPLES CONTAIN A HIGH PERCENTAGE OF SILICA, WHICH IS CONSISTENT WITH THE NATURE OF THE MATERIAL OBTAINED FROM THE SITE.

are restrained and enjoined from prosecuting certain cases pending in the Municipal Court of Chicago, against the complainants the De Luxe Motor Cab Co., a corporation, Joseph F. DeGraff and William Merkel.

The cases in the Municipal Court charged the complainants here with violating section 42a of the Illinois Motor Vehicle Law and section 3917 of the Chicago Municipal Code of 1922.

Plaintiffs urge, and we believe on good grounds, that the brief of the defendants does not comply with Rule 19 of this court. Rule 19, referred to, provides in part as follows:

"The brief of the party bringing the cause into this court shall contain a short and clear statement of the case, showing: first, the form of the action, how the issues were decided in the trial court and whether by verdict or finding of the court or upon a report of the Master, and what the judgment or decree was; second, the nature of the pleadings sufficiently to show what the issues were and to present any question subject to review arising on such pleadings; third, in cases depending upon the evidence, the leading facts which such evidence proved or tended to prove, without quotation of evidence, discussion or argument and without detail; and, fourth, a terse outline of the principal points relied upon for reversal. The statements of facts so made may be taken to be accurate and sufficient unless the opposing party shall, in his brief, in like manner, point out wherein it is inaccurate or insufficient. The statement of the case shall be followed by a brief of the points relied upon and the authorities to support them. . . ."

From an examination of the brief in question it is clear that it does not contain a short, clear statement of the case, as provided by said rule, nor the leading facts which the evidence tended to prove, nor a terse outline of

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as follows:

[illegible]

There are several other things which I have noticed about the people who live in the area. They are very friendly and helpful. They also like to dance and sing. The music is very loud and they like to hear it. They also like to see the people who live in the area. They are very curious about the world and they want to know everything about it.

the principal points relied upon for reversal nor assignments of error. The brief proceeds to set out almost in full the various pleadings and then proceeds to set out the testimony of certain witnesses and then proceeds to argue the case, citing authorities, without stating a terse outline of the principal points relied upon for reversal and does not include a brief of the points relied upon and the authorities to support them, as provided by said rule. Following the argument we find certain cases listed under certain headings which may have been intended for points and authorities, or may be considered as part of the general argument.

The work of this court and of counsel who are required to answer such a brief is, necessarily, increased by reason of the failure to conform to the rule as provided for in this court. It is almost impossible to hunt out and discover, under such a brief, such points as are discussed for the consideration of this court as grounds for reversal and necessarily equally as difficult for counsel in answering said brief to decide what points or assignments of error are necessary to answer in order to meet a brief of this character. Strobl v. Ingels, 245 Ill. App. 607; Robert v. Chalmers & Williams, 307 Ill. App. 457.

By reason of the failure of complainants, appellants here, to file a brief in conformity with the rules of this court, the said cause is dismissed and the motion to file reply briefs instanter is denied.

APPEAL DISMISSED.

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32499

250 I.A. 630

SARAH E. McDONALD and
GEORGE T. McDONALD,
Plaintiffs in Error,

v.

LEWIS E. BARTLETT,
Defendant in Error.

ERROR TO SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This writ of error is prosecuted to reverse an order of the Superior court, entered July 6, 1927, directing the issuance of a writ of assistance to dispossess complainants, Sarah E. and George T. McDonald, of premises known as 11123 South Ashland avenue, (Morgan Park), in Chicago, Illinois.

On August 20, 1913, complainants filed their bill against defendant, Bartlett, praying for the specific performance of a contract that he had made for a conveyance to them by quit-claim deed (under certain conditions) of said premises, of which they were then in possession, and for further relief. After Bartlett had filed an answer and a supplemental answer, and evidence had been taken before a master in chancery and he had filed his report, a decree was entered on October 1, 1925, wherein the Court, after making numerous findings, ordered that, upon complainants paying certain moneys to Bartlett, he execute said deed to them, etc. From this decree Bartlett perfected an appeal in the Supreme Court, and on February 16, 1927, said decree there was reversed and the cause was remanded "with directions to dismiss the bill for want of equity." (324 Ill. 549, 559.) On March 3, 1927, the mandate of the Supreme Court was filed. On June 27, 1927,

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TO THE ATTORNEY GENERAL

WASHINGTON, D.C.

JOHN F. BURNETT and
JOHN F. BURNETT,
Attorneys at Law.

JOHN F. BURNETT,
Attorney at Law.

RE: BURNETT (JOHN F.) and BURNETT (JOHN F.) vs. BURNETT (JOHN F.).

This bill of lading is presented in pursuance of the order of

the Superior Court, docketed July 1, 1937, directed the Illinois

of a bill of lading to be presented to the Superior Court, docketed July 1, 1937.

George F. Burnett, of Chicago, Illinois, is the owner of the

goods, (Chicago, Illinois).

On August 11, 1937, the goods were shipped from Chicago, Illinois

to St. Louis, Missouri, by the Illinois Central Railroad Company.

It is requested that you issue a bill of lading to the Illinois

(under certain conditions) of the goods, at which time they were then

in possession, and the Illinois Central Railroad Company.

It is requested that you issue a bill of lading to the Illinois

a master in possession and he has filed his report, a bill of lading

on October 1, 1937, under the name, JOHN F. BURNETT, docketed July 1, 1937.

It is requested that you issue a bill of lading to the Illinois

goods, at which time they were then in possession, and the Illinois

an appeal to the Superior Court, docketed July 1, 1937, and the Illinois

there was returned and the bill was returned with a bill of lading to the

and the bill was returned with a bill of lading to the Illinois

1937, the Superior Court, docketed July 1, 1937.

Bartlett filed a petition (to which a copy of the opinion of the Supreme Court was attached) alleging that complainants were still in possession of the premises wrongfully, and praying that, "in accordance with the Supreme Court decision," an order be entered commanding complainants to deliver possession of the premises to him (Bartlett) within a short day to be fixed, and that, upon their failure so to do, a writ of assistance issue. On the same day the Court entered an order, (1) that complainants deliver possession of the premises to defendant within five days; (2) that, in case of their failure so to do, a writ of assistance issue; (3) that complainants' bill of complaint be dismissed; and (4) that defendant have judgment against complainants for costs, etc. On July 1, 1927, complainants filed their petition objecting to the court issuing any writ of assistance or taking any further steps in the cause save that of carrying out the mandate of the Supreme Court and dismissing complainants' bill for want of equity. On July 6, 1927, the parties appeared and there was a hearing on both petitions, resulting in the court denying complainants' petition that a writ of assistance do not issue, and granting the petition of defendant that a writ of assistance do immediately issue to deliver possession of the premises in question to defendant. It will be noticed that when the order of July 6, 1927, was entered, the court had prior thereto (on June 27, 1927) ordered the dismissal of complainants' bill.

We are of the opinion that the court was without authority or jurisdiction to enter the order of July 6, 1927, or to enter those portions of the order of June 27, 1927, directing complainants to deliver possession of the premises to defendant, etc. The court only had the authority to carry out the mandate of the Supreme

Sanford filed a petition [to which a copy of the order of the
 Supreme Court was attached] alleging that respondents were still
 in possession of the premises notwithstanding that, in
 accordance with the "proper legal procedure," an order had been
 commanding respondents to deliver possession of the premises to
 him (Sanford) within a short time to be fixed, and that, upon doing
 failure to do so a writ of attachment issued. On the same day the
 Court entered an order. [It then commanded certain persons of
 the premises to deliver within three days (7) days, if not by
 their failure to do so a writ of attachment issued. It then com-
 manded, that of respondents to deliver, and (1) that respondents
 have judgment against respondents for costs, etc. on July 1, 1937.
 respondents filed their petition relating to the same pending and
 will be returned at a later date. In the same case that
 of carrying out the mandate of the Supreme Court and obtaining pos-
 session, will be at once. On July 1, 1937, the petition
 against the Court was a petition for writ of attachment in the
 Court against respondents, wherein it is a writ of attachment in the
 Court, and showing the petition of respondents that a writ of attachment
 do immediately issue to deliver possession of the premises to
 respondents to respondents. It will be ordered that upon the same of
 July 1, 1937, and entered. The Court has since then on July 1,
 1937) ordered the dismissal of respondents' writ.
 On the 1st of July 1937 the Court was without authority
 or jurisdiction to enter the writ of July 1, 1937, or to issue those
 orders of the order of June 27, 1937, against respondents to
 deliver possession of the premises to respondents, etc. The writ
 only had the authority to carry out the mandate of the Supreme

Court, viz, dismiss complainants' bill for want of equity. In Fisher v. Burks, 235 Ill. 290, 293, it is said: "In this case the mandate certified by the clerk gave specific directions to the trial court to dismiss the bill for want of equity. It was the duty of the chancellor to follow and obey that mandate. The mandate is the judgment of this court transmitted to the circuit court. Where the direction contained in it is precise and unambiguous, it is the duty of the trial court to carry it into execution and not look elsewhere for authority to change its meaning or direction. * * It is the mandate of the court of review, and not its opinion, that governs, when the mandate differs from the opinion or is specific and plain in its terms. * * The dismissal of the bill for want of equity was the only proper thing that the lower court could do under the mandate before it. Blackaby v. Blackaby, 189 Ill. 342; Railway Equipment Co. v. Brake-Beam Co., 239 id. 111."

Accordingly, the order of the Superior court of July 6, 1927, is reversed, as are also all portions of the order of June 27, 1927, except those wherein it is ordered that complainants' bill be dismissed, and that defendant have judgment against complainants for costs, etc.

REVERSED.

Scanlan and Barnes, JJ., concur.

32512

250 I.A. 630³

SAM STEPKE,
Appellee,

v.

M. E. SHANKMAN and
S. KASTIL,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

On August 12, 1927, a judgment by confession for \$729.88 was entered against defendants upon a judgment note for \$650, signed by each, dated June 23, 1927, and payable to plaintiff's order 30 days after date with interest at 6% per annum. The court allowed \$75 as a reasonable attorney's fee and this amount was included in the judgment, - the other items, making up the total amount as confessed, being the principal sum, \$650, and \$4.88, accrued interest. Subsequently, defendants appeared and moved that the judgment be opened and they be given leave to plead. The motion was supported by the affidavit of Sam Kastil, one of the defendants. No affidavit was presented by the other defendant. After several continuances the court finally denied the motion and the present appeal followed.

The main contentions of defendants' counsel is that the court erred in denying the motion because Kastil's affidavit disclosed prima facie a meritorious defense to a part of the face of the note. We cannot agree with the contention. For aught that appears in the affidavit the other defendant, Shankman, has no defense to any part of the note or to the judgment as confessed. As to Kastil's claimed defense he alleged in substance that he and plaintiff formerly were

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FORM NO. 10-60 (REV. 1-55) U.S. GOVERNMENT PRINTING OFFICE: 1960 O - 345-000

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1999-2000

It may be difficult to change the way we think, but it is not impossible. The first step is to become aware of our own thought patterns. This can be done by keeping a journal or by simply reflecting on our thoughts throughout the day. Once we are aware of our thoughts, we can begin to challenge them. We can ask ourselves if our thoughts are based on facts or if they are just assumptions. We can also try to see things from different perspectives. This can help us to develop a more balanced and realistic view of the world. Finally, we can try to change our thoughts by focusing on positive things. This can help us to develop a more optimistic and hopeful outlook on life.

...the

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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100-443887-100

engaged in a jobbing business as partners; that about a month prior to the date of the note the partnership was dissolved and Kastil purchased plaintiff's interest therein; that at the time of the purchase plaintiff made certain false and fraudulent representations, relied upon by Kastil, as to the total liabilities of the firm and as to the collectibility of certain accounts receivable of the firm which accounts Kastil took over; and that as a result of said false representations Kastil suffered certain losses. The allegations as to the claimed fraud are vague and indefinite. Conclusions rather than facts are stated. Furthermore, for aught that appears to the contrary, Kastil had access to the books of the partnership and had means of ascertaining the firm's liabilities and the collectibility of the accounts. And it is only charged that said accounts "became" uncollectible, not that they were uncollectible at the time Kastil made the purchase. Kastil also alleged that he, individually, had guaranteed plaintiff's note to a third party for \$180, which note plaintiff had failed to pay and Kastil had been compelled to pay it. This item is not a proper subject for set-off as against a judgment confessed against two defendants on a note signed by both. (Coates v. Preston, 105 Ill. 470, 472; International Bank v. Jones, 119 Ill. 407, 410; Perates v. Tompary, 182 Ill. App. 495, 496.)

And we do not think there is any merit in counsel's further contention that the court erred in including \$75 as attorneys fees in the judgment as confessed. The note provided for "reasonable" attorney's fees upon a confession of judgment being entered, and we think that \$75, as fixed by the court for such fees when entering the judgment, is a reasonable sum.

engaged in a fishing business as defendant until about a year
prior to the date of the sale the partnership was dissolved and
Kearl purchased plaintiff's interest therein at the time of
the purchase plaintiff was certain that the partnership
representations, relied upon by Kearl, as to the total liabilities
of the firm and as to the solvency of certain accounts receivable
of the firm which accounts Kearl took over and that as a result
of said false representations Kearl suffered serious losses. The
allegations as to the fraud of the partnership and defendant, the
allegations as to the fraud of the partnership, the alleged loss
appears to the contrary, Kearl had notice to the extent of the
partnership and had means of determining the true liabilities and
the solvency of the partnership. It is also charged that
said accounts "Kearl" "Kearl" "Kearl" and that they were uncollectible
at the time Kearl made the purchase. Kearl also alleged that
he, individually, had purchased plaintiff's note as a gift from
for \$100, which said plaintiff had taken to pay him Kearl had
been completed in July 1911. This item is not a proper subject for
set-off as against a judgment entered against the defendant on a
note signed by him. (Exhibit 7 - Plaintiff, and 111 - 100, 1911)
Exhibit 111 - 100, 1911. Plaintiff, and 111 - 100, 1911. Plaintiff, and 111 - 100, 1911.
and as to the other items he was not in possession.

Further testimony that the court upon its investigation of the
affairs of the firm in the judgment as concluded. The court provided
for "reasonable" attorney's fees upon a contract of judgment
being entered, and as that item 111, as shown by the court for
such fees upon entering the judgment, is a reasonable sum.

Equally without merit, we think, is counsel's further contention that the court erred in entering the judgment, because, in the judgment clause of the note, above the signature of both defendants, are the words "and to secure the payment of said amount I (instead of "We") hereby authorize, irrevocably, any attorney of any Court of Record to appear for me," etc. (See Sub-sec. 7 of Section 17 of Illinois Negotiable Instrument Law; Harris T. & S. Bank v. Neighbors, 222 Ill. App. 201, 203.)

The judgment appealed from is affirmed.

AFFIRMED.

Scanlan and Barnes, JJ., concur.

Western is at Illinois Department of Revenue; Harry E. B. is
of any kind of record as agent for me. [See Exhibit 7 & 8]
I intended to "be" merely confidential informant, not attorney.
rehabilitate, and the state "and to secure the recovery of said money
in the judgment of the state, from the plaintiff's estate.
contending that the money was in violation of the plaintiff's contract,
specific alleged will, or lack, or recovery of said money.

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100

13. *Chlorophyll a* (mg/g dry weight)

32521

250 T A. 630⁴

CHARLES SCHLOSSER,
Appellee,

v.

CHICAGO AND NORTHWESTERN
RAILWAY CO., a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GRILEY DELIVERED THE OPINION OF THE COURT.

Plaintiff, as consignee of a car of peaches, shipped from Palestine, Texas, to Chicago, Illinois, caused it to be diverted over the rails of defendant company to Elgin, Illinois, where it arrived about July 17, 1913. There were in the car 812 half-bushel baskets or hampers of peaches. Upon inspection some of the peaches were found to have been damaged because of the shifting of some of the baskets while in transit. Plaintiff had either sold the peaches to a firm doing business as the Elgin Fruit & Produce Co., commission merchants at Elgin, or had arranged with that firm to sell them for him on commission. On September 27, 1913, a claim for damages was filed by plaintiff, by his attorney, with the proper department of defendant, in part as follows:

| | |
|--|----------------|
| "Value, 812 - 1/2 bu. Pchs, 1.66 del'd., | \$1339.80 |
| Less frt. | 185.00 |
| Less brokerage | 20.00 |
| | <hr/> 1134.80 |
| Realized per a/c sale | 652.80 |
| | <hr/> \$475.00 |

Car arrived destination in a wrecked condition, per bad order report C & N. W 234758. We were compelled to make allowance to buyer of \$475 to keep car sold."

The defendant refused to pay the \$475 demanded, and thereafter the present action was commenced. In his original statement of claim plaintiff made substantially the same claim as to amount,

and also demanded interest thereon at 5% per annum from July 16, 1913. A trial was had before a jury in November, 1927. The main question was the amount of damage to the peaches. During the trial plaintiff obtained leave to file, and filed, an amended statement of claim, in which he stated his damages to be as follows:

| | |
|--|------------------|
| "The fair and reasonable market value of the shipment at the point of destination * * when delivery should have been made in sound and merchantable condition----- | \$1421 |
| The fair and reasonable market value thereof at time of delivery in their then condition | 720.80 |
| Total money damages | <u>\$ 700.20</u> |
| Interest at the rate of 5% per annum from July 16, 1913." | |

The first figures of \$1421 is at the rate of \$1.75 for each of the 812 half bushel baskets, and the second figure is at the rate of about 90 cents per basket.

On November 15, 1927, the jury returned a verdict against defendant and assessed plaintiff's damages at \$475, "plus interest at 5% from Sept. 27, 1913." Endorsed upon the verdict, over the signature of the trial judge, is the following: "The court figures the interest at 5% from Sept. 27, 1913, to date at \$23.75 a year and for 14 years a total of interest \$332.50; total int. and principal \$807.50." After defendant's motions for a new trial and in arrest of judgment had been overruled, the court entered judgment against defendant for \$807.50 and this appeal followed.

Although numerous grounds for a reversal of the judgment are urged by defendant's counsel in their printed brief, the only one stressed in oral argument is that the verdict is manifestly against the weight of the evidence as to the amount of damages awarded.

Plaintiff was his only witness as to the damage, as determined by his examination of the peaches within a day after

the car's arrival in Elgin, but his testimony in this regard is indefinite and unsatisfactory. He testified in substance that he first examined the contents of the car in Chicago after its arrival there from Texas; that the baskets were properly braced and in good order; that he opened some of the baskets and found the peaches in good condition and "very nice;" that he arranged over the telephone with Mr. Cioca, one of the partners of said Produce Co. firm at Elgin, to sell the peaches to them at \$1.65 per basket, and he caused the car to immediately be diverted to Elgin; that upon its arrival there about two days later, he and Cioca examined the contents of the car; that this examination was made quickly; that it looked like the baskets had had "pretty hard usage;" that their bracings seemed to have been broken and that they had been shifted towards the center; that some were open and the peaches "more or less scattered" on the floor; that he could not tell how many; that some of them looked as if they still were in good condition; and that he and Cioca personally reported the conditions to the station agent of defendant at Elgin.

Plaintiff further testified that, carrying out his original arrangement with Cioca, he shortly thereafter sold all the 812 baskets at \$1.65 per basket to the Produce Co. firm, but that he made them an allowance of \$475 on account of the peaches which were damaged; that he arrived at that figure (\$475 off the original bill) "after a good deal of argument with Cioca, who figured that he ought to have more, and we compromised on that much of an allowance;" that "it was difficult to determine the damage below the tops, they looked pretty bad, they might turn out better, they might turn out worse;" and that, "because of the limited market outlet, I thought I had better make the

the car's activity in light of the fact that it was not
immediately and immediately. It is possible that
he first examined the contents of the car in order to
arrive at some point where the contents were properly placed and
in good order; that he spent some of his time in looking for
persons in good condition and "very nice" that in looking for
the telephone with Mr. Brown, one of the persons at the house in
him at first, to tell the person in the car that he was
around the car as immediately he arrived in light of the fact
arrived there about the same time. He was also looking for persons
of the car; that this examination was made entirely that it looked
like the persons had had "greatly have" and that their condition
seemed to have been taken and that they had been in the house
the car; that some were open and the person at the house
on the first that he could not tell how many; that some of the persons
as if they were in good condition; and that he was also
normally reported the condition of the person at the house at
light.

of the limited number entitled, I thought I had better make two
might turn out better, they might turn out worse," and finally "because
to determine the things before the fact. They began having both things
and we ~~consequently~~ as that was all the agreement, that it was all right,
deal of argument with them, who figured that he ought to have more.
he arrived at 10:15 figure (with the original title) "After a good
allowance of \$400 on account of the expenses which were incurred; that
at 11:00 got packed to his room at 11:00. But he went down to
arrangement with him, he shortly thereafter took off the car subject
ultimately further facilities were arranged and the subject

allowance." It thus appears from plaintiff's testimony that his claim against defendant, as originally made on September 27, 1913, and as afterwards stated in his original statement of claim filed in the cause, and as allowed in full by the jury's verdict, \$475, was based upon a compromise made between plaintiff and the produce Co. firm, at a time when neither knew the extent of the damage to the peaches. And plaintiff introduced no evidence tending to show that defendant had any knowledge of the compromise or that it had agreed to allow said sum, or any other sum, as damages because of its claimed negligence or breach of contract in transporting the car from Chicago to Elgin.

During the trial plaintiff sought to prove his damages even to a larger amount than as originally claimed by his own unsupported testimony as to the reasonable market values in Elgin on July 17, 1913, of the peaches in the condition in which they should have been delivered, and of the peaches as actually delivered. Notwithstanding his other testimony that he had arranged to sell them to the Produce Co. firm at \$1.65 per basket, delivered at Elgin, at a time when his examination of the car in Chicago had disclosed that the peaches were all in good condition and "very nice," he testified on direct examination that he was acquainted "in a general way" with the market price of peaches in Elgin on that date and prior thereto; that he knew the reasonable market value of good, merchantable peaches of the grade of the particular peaches; that the reasonable market value of such peaches in sound, merchantable condition in Elgin on that date "was \$1.75 to \$1.85 a basket, that is, baskets of this kind, half bushel baskets;" and that the reasonable market value of these particular peaches, "in the condition I discovered them on July 17, 1913, was 90 cents to one dollar (\$1)." On cross-

examination he testified that he fixed his figures (\$1.75 to \$1.85) "largely from my knowledge that I had originally sold the car at \$1.65; I figured that Cioca was going to make a profit; as I had sold the car at \$1.65, delivered at Elgin, I, therefore, assumed that the car would be worth \$1.75 or \$1.85, at least that or more;" that, as to his figures "90 cents to one dollar," he arrived at them "from investigation of the peaches which were damaged; it was pretty hard to do this; they might be damaged worse than I thought and they might not be as bad; I would, as a market expert, say that the value of those peaches would be pretty well established if they were actually sold; it was impossible to make any count of the number of peaches damaged." It is apparent that plaintiff's testimony as to market values of the peaches, damaged or undamaged, is of no weight.

Defendant introduced several witnesses as to the extent of the damage and as to the reasonable market value of the peaches of their grade in good, merchantable condition. They all testified that such value at Elgin on July 17, 1913, was \$2.50 per bushel basket, or \$1.25 per half-bushel basket or hamper. One witness testified that peaches usually were contained in bushel baskets, that half-bushel baskets or hampers were not as salable, and that, therefore, the market value of the peaches in half bushel containers, was slightly less than \$1.25. Defendant's principal witness was Christ Schock. He testified that in July, 1913, he was a partner with Cioca, as fruit and produce commission merchants at Elgin, under the firm name of Elgin Fruit & Produce Co.; that his firm did not buy the peaches in question outright from plaintiff, but that it sold them for him on the basis of 10% commission; that there was a loss of only the peaches in 20 hampers out of the 812; that plaintiff received from

examination he testified that he found the T-100 (1.75 to 1.85) "largely from my knowledge that I had originally sold the car at \$1.85; I thought that there was going to be a profit; as I had sold the car at \$1.85, delivered as is, I thought, naturally, that the car would be worth \$1.75 or \$1.80, at least that on average that, as to his license "I would be sure to make it, as I thought "from investigation of the purchase price was \$1.85, it was quite hard to see that they might be damaged when I bought and they might not be as well; I would, as a matter of fact, say that the value of these goods would be pretty well maintained in any case actually sold; it was impossible to make any profit of the money of purchase money." It is apparent that the T-100's testimony as to market value of the purchase, showed to be correct, is of no weight. Defendant introduced several witnesses as to the value of the goods and as to the reasonable market value of the goods at the time they were in good, marketable condition. They all testified that such value of \$1.75 to \$1.85, was \$1.85 per bushel, based on \$1.85 per half-bushel, based on weight. The witness testified that goods would be maintained in good condition, and that the market price of goods was not as high as \$1.85, and that, therefore, the market value of the goods in half-bushel containers was slightly less than \$1.85. Defendant's principal witness was Fred Weber. He testified that in July, 1934, he was a partner with these, as Fred and Arthur conducted business of grain, wheat, and live stock of grain from a license that they had and that they had the goods in question shipped from Germany, and that it was about the time on the basis of 1934 testimony that there was a loss of only the goods in the market and of the \$1.85 that slightly recovered from

the sale of 792 hampers the sum of \$926.75, less commissions, freight charges, icing and demurrage charges (corroborated by statement of account of said firm, introduced in evidence); that he examined the peaches upon their arrival on July 17, 1913; that because of the shifting of the hampers in the car some of them had been broken and some of the peaches bruised or smashed; that only 65 hampers, all told, were damaged; that about 45 were broken but the peaches in them were not damaged; that these peaches were re-packed by his firm in other containers; and that, excepting those in the 65 hampers, all of the peaches in the car were "nice peaches in good condition."

After reviewing the evidence we are of the opinion that the amount of damages, \$475, as awarded to plaintiff by the jury, is grossly excessive and that a judgment based thereon cannot be sustained. And we do not think that there was any justification for the allowance of interest on plaintiff's claim from September 27, 1913. The claim was an unliquidated one, and the provisions of section 2 of our Interest Act do not sanction the allowance of interest in such a case. (See, also, Smith v. Gray, 316 Ill. 488, 497; Laughlin v. Hopkinson, 292 Ill. 80, 86; Maremont, etc. Co. v. Schwarzschild, etc. Co., 194 Ill. App. 619, 624.)

Our conclusion is, that, under the evidence, the greatest amount of damages the jury could properly have awarded would have been for the 65 baskets or hampers, which, apparently, were the only ones in anywise damaged. The market value of these was shown to be about \$1.25 per basket, or a total for the 65 baskets of \$81.25. We consider this a liberal amount, as it appears that some of the peaches in these baskets were repacked and afterwards sold for something. Accordingly, there should be a considerable remittitur from the judgment of \$807.50.

If plaintiff will here remit therefrom within 10 days the sum of \$726.25, the judgment will be affirmed for \$81.25; otherwise it will be reversed and the cause remanded. If the remittitur is filed each party will pay his or its own costs in this appellate court, and no costs will here be taxed against either.

APPROVED FOR \$81.25 AGAINST DEFENDANT
ON REMITTITUR.

Scanlan and Barnes, JJ., concur.

It is possible that some of the material in this report may be of interest to you. The following is a list of the material which has been collected and is being sent to you for your information. It is hoped that it will be of some use to you in your work.

Very truly yours,
 J. H. HARRIS

London and Essex, 11th March.

250 I.A. 631

32533

BERYLE H. CHILDS,
Appellee,

v.

PIERRE HUYTTENS,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

In a fourth class action in contract, commenced May 4, 1926, there was a trial without a jury on November 1, 1927, resulting in the court finding the issues against defendant and assessing plaintiff's damages at \$500. Judgment was entered upon the finding and defendant appealed.

In his statement of claim plaintiff alleged that on June 8, 1925, he owned a dog, commonly known as a Russian wolfhound, of the value of \$500; that at defendant's request he delivered it to defendant, who "agreed to purchase this dog at the then market value or to return it to plaintiff within a reasonable time;" and that a reasonable time has elapsed and defendant has neither returned the dog nor paid for its value, to plaintiff's damage in the sum of \$500.

In his affidavit of merits defendant denied that he ever agreed to purchase the dog or that it was worth \$500, or that he was indebted to plaintiff in any sum. He alleged that he kept the dog gratuitously, until, through no fault of his, it ran away and was lost, and that, while the dog was in his possession, he at all times properly cared for it.

On the trial plaintiff testified in his own behalf and Howard M. Brown for him. Defendant also was a witness. Brown

1994

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Journal of Management Studies, 36(7), 809-826.

and on 2000-01-20, the following information was received:

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The value of β is not as high as the value of α is.

Author's address: 1011 15th Ave. S., Minneapolis, MN 55455, USA.

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It is also noted that the following information was obtained from the file:

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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NOTE: Legend is on page 10. Includes 1994-95 season. All are from the same source.

testified that he purchased the dog in Canada, when it was a pup, and brought it to Chicago; that when it was about five months' old he sold it to plaintiff for \$200; that subsequently he talked to defendant about the dog at the Cafe Chez Pierre, which defendant owned and conducted in Chicago, and the latter expressed a desire to see it; that he (Brown) then said he would have it sent over to the cafe; that no mention of price was made; that the arrangement was that the dog was to be "sent over there just to look at;" that plaintiff caused it to be delivered at the cafe; that shortly thereafter he (Brown) saw it there in defendant's possession; and that defendant seemed pleased with it, but said that he wanted to see how it behaved, and to watch and observe it.

Plaintiff testified in substance that he and Brown were friends; that Brown informed him of his talk with defendant about the dog; that shortly prior to July 8, 1925, he telephoned defendant about bringing the dog to defendant's cafe and defendant told him to do so and said that he (defendant) "would either buy the dog or return it;" that no price then was mentioned; that he (plaintiff) caused the dog to be delivered at the cafe on July 8, 1925; that at this time it was grown up; that "three or four weeks possibly after the dog was delivered" he saw defendant at his cafe and told him to return the dog if he did not want it; that defendant then said that it had run away, that some woman dancer in the cafe had taken it out for an airing and that it had gotten away from her; that he (plaintiff) had owned many dogs, had bought and sold them, had attended numerous dog shows, and believed himself qualified to testify as to the value of the particular dog; and that, taking into account its pedigree and its training, it was worth \$500. Neither plaintiff nor his witness, Brown, testified as to its market value in Chicago, or that such a dog, with a pedigree, had a market value.

...that he purchased the land in Chicago, when it was a prairie.
and brought it to Chicago; that when it was about five hundred, six
he sold it to the plaintiff for \$2000; that subsequently he sold to
defendant, around the day of the late Mrs. Hester, which defendant
owned and resided in Chicago, and the latter signed a receipt
to her for the land (which then was in good form) it went over to
the wife; that no receipt of price was made; that the defendant
was that the day was to be "paid over" there being no cash and that
plaintiff stated as he had delivered of the money that plaintiff
after he (Hester) was in there in defendant's possession; that that
defendant was then placed with it, and that he wanted to see how
it behaved, and so called and observed it.

Plaintiff testified as evidence that he and Hester were
friends; that Hester returned him of his wife with defendant's money
the day that Hester paid him \$2000, in defendant's possession
about bringing the day to defendant's wife and defendant told him to
do so and that he (Hester) "would return" the day to return
it; that he paid him the money; that in (plaintiff's) possession
the day to be delivered of the wife on July 21, 1880; that on this
time it was given and that "there was some money" given to
the day delivered; to the defendant at his wife and this time to
return the day to the day and that the defendant told him that
it was not money, that some money was given to him and that it was
for an alive and that it was given to him that was his share-
hold (and some money, but some and some more, and some more)
monetary and above, and believed himself entitled to receive it as
the value of the defendant's land and money, being that amount; the
defendant and his witness, it was worth \$2000, neither plaintiff
nor his witness, Hester, testified as to the money value in Chicago,
as that was a day with a plaintiff, and a witness value.

Defendant testified in substance that he had the dog in his possession for two or three months; that he never agreed to buy it from plaintiff for any sum; that nobody ever asked him to return it; that he had allowed a young woman, who was working in his cafe, to take it out several times with her, but that she did not lose it; that he never told plaintiff she had lost it; that it ran away from him one night, about 2 o'clock a. m., when he had taken it out, without a leash, for an airing; that he never afterwards saw it, although he made endeavors to find it, by reporting its loss to the police and by inserting advertisements in a Chicago newspaper; that he had frequently taken it out with him during the night-time, without a leash, and it had never before attempted to run away; and that he had always given it good care.

At the conclusion of the trial the judge said that he was going to find for the plaintiff, that it was difficult to conceive of a dog being worth as much as \$500, and that he was inclined to allow to plaintiff the amount he originally had paid for it, \$200, and about \$150 in addition, in all \$350. Upon the court stating that a finding and judgment in that sum would be entered, defendant moved for a new trial. Thereupon the court said: "I will change the order; judgment for \$500."

Defendant's counsel here contend that there can be no recovery by plaintiff in the present case for the reason that the transaction of the parties constituted a bailment for mutual benefit, that under such a bailment defendant only was required to exercise ordinary care of the dog, and that he did exercise ordinary care of it. In support of the contention the cases of Colton v. Wise, 7 Ill. App. 395, 397, and Hunt v. Wyman, 100 Mass. 198, 199, are cited. In the former case it is decided that a mere option on the part of one

[illegible]

person to purchase an animal if he likes it, and his taking the animal upon trial, constitutes a bailment and not a sale, and that in such a case the bailment, contemplating a mutual benefit, imposes upon the bailee only the obligation of ordinary care in keeping and returning the animal. Following these authorities we think that under the evidence plaintiff is entitled to recover damages in a substantial amount. It is clear to us that defendant was not in the exercise of ordinary care in the keeping of the dog, when, at 2 o'clock in the morning, in a large city, he took the dog, unleashed, out for an airing, resulting in it running away and not being thereafter found.

But we think that, in the absence of evidence of a market value of \$500, in Chicago, of such a dog, the amount of the finding and judgment, \$500, as finally entered, is excessive. We think the court's finding of \$350, as originally announced, is more reasonable, and we are inclined to follow it. Accordingly, if, within ten days, plaintiff will remit from the judgment the sum of \$150, it will be affirmed against defendant for \$350; otherwise it will be reversed and the cause remanded.

AFFIRMED ON REMITTANCE OF \$150;
OTHERWISE REVERSED AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

250 I.A. 631

32543

CATHERINE HOWARD, administratrix
of the estate of SAMUEL F. HOWARD,
deceased,

Appellant,

v.

CHICAGO TITLE & TRUST COMPANY,
administrator of the estate of
GEORGE C. AMERSON, deceased,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

On the third trial of an action for negligently causing the death of plaintiff's intestate by his being struck and run down by an automobile on August 14, 1917, while he was walking across West Madison street, near Cicero avenue, Chicago, the court, on September 27, 1927, at the conclusion of all the evidence, instructed the jury to find the defendant, Chicago Title & Trust Co., as administrator, etc., not guilty. Such verdict was returned and on October 29, 1927, judgment was entered thereon against plaintiff, and the present appeal followed.

The action was commenced on July 22, 1918, against George C. Amerson and Ellsworth T. Robie. On the first trial, had in September, 1921, Robie was dismissed as a defendant, a juror withdrawn and the cause continued. Plaintiff's original declaration, consisting of 10 counts, charged in substance that on the day mentioned Amerson was in possession and control of the automobile, by his servant and chauffeur, Robie, and that the latter so negligently in various particulars drove the same that Howard, while in the exercise of due care, was struck, run down and killed. To the declaration Amerson filed a plea of the general issue, and a special plea denying

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possession, control or operation of the car by him, or that it was being operated by Robie under his (Amerson's) direction or authority, or that Robie was his agent or servant. The second trial was had on October 25, 1923, resulting in the court directing the jury, at the close of plaintiff's evidence, to find Amerson not guilty, which verdict was returned and judgment entered against plaintiff, who appealed to this appellate court, and on April 29, 1925, the judgment was reversed and the cause remanded. (Howard v. Amerson, 236 Ill. App. 587, 594.) In the opinion, filed by the 3rd division, after mentioning Amerson's said plea, it is stated (p. 588) that plaintiff (on said 2nd trial) submitted evidence to show that the deceased was struck by a passenger automobile, being driven by Robie, and that this was due to Robie's careless driving of the car; that, "in the course of the evidence, counsel for defendant expressly admitted that defendant Amerson was the owner of the car;" that the trial court directed a verdict in defendant's favor "upon the ground that plaintiff had failed to meet the burden of proof, which was on her to show, that Robie * * was a servant or agent of defendant, the owner of the car, and that Robie was using it in and about defendant's business;" that defendant, by his special plea, put in issue the questions, whether Robie was his servant or agent and whether at the time and place in question Robie was engaged upon defendant's business; that the burden was upon plaintiff to prove the affirmative of these questions of fact; but that she contended that defendant's express admission of ownership of the car furnished prima facie proof of agency and control, and that, hence, the burden of proceeding with evidence to the contrary, shifted to defendant. After referring to some of the authorities pertinent to the contention, and showing the conflict therein, the court said (p. 592) that "the better reasoning supports the proposition that where the defendant puts in issue the question

of the operation of the automobile, by his servant and the use of it in connection with his business, although the burden of proof throughout the trial of establishing the affirmative on those matters by a greater weight of the evidence remains with the plaintiff, a prima facie case is, nevertheless, made out of these questions by either the admission of ownership on the part of the defendant, or proof of such ownership by the plaintiff, and, such prima facie case being made out of these questions by the plaintiff, the burden of proceeding with the evidence is shifted to the defendant." The court further said (p. 593): "When, in the course of putting in the plaintiff's case, the defendant expressly admitted ownership of the automobile, a prima facie case was made out on those questions on which the plaintiff had the burden of proof. Indeed, we are inclined to the belief that such was the effect of the failure of defendant to deny ownership by a special plea, but, however that may be, when the defendant expressly admitted ownership, the plaintiff had made out at least a prima facie case, on the issue of agency and the question of the use of the automobile in the defendant's business. That being the state of the proof at the close of the plaintiff's evidence, it was error for the trial court to instruct the jury to find the issues for the defendant."

In November, 1925, after the mandate of this appellate court had been filed in the Superior court, the cause was re-docketed. On May 27, 1926, upon it being suggested of record that defendant, Amerson, had died intestate in August, 1925, and that the Chicago Title & Trust Co. had duly been appointed administrator of his estate, the court, on plaintiff's motion, entered an order reviving the action against said administrator as sole defendant, and plaintiff on the same day, by the court's leave, filed an amended declaration, consisting of 10 counts, substantially the same as those

of the question of the responsibility, for his answer, and the fact of
 it in connection with his business, although the matter of proof
 throughout the trial of responsibility, the witnesses on these
 matters by a number of facts of it, evidence pointing to the fact
 that, a prima facie case is, nevertheless, not a case of prima facie
 by which the evidence of responsibility on the part of the defendant, as
 proof of such responsibility by the plaintiff, not, prima facie case
 being held out of these questions of the plaintiff, the burden of
 proofing with the evidence is shifted to the defendant. The court
 further said (p. 200): "Now, in the course of going to the plain-
 tiff's case, the defendant expressly admitted ownership of the auto-
 mobile, & prima facie case was made out on these questions on which
 the plaintiff had the burden of proof. Indeed, we are inclined to the
 belief that such was the effect of the failure of evidence to show
 ownership by a special plea, but, however that may be, that the
 defendant expressly admitted responsibility, the plaintiff had made out
 at least a prima facie case on the issue of ownership and the question
 of how was of the responsibility is the defendant's business. Then
 being the state of the proof at the close of the plaintiff's case,
 hence, it was error for the trial court to instruct the jury in that
 the issues for the defendant."

In November, 1912, after the motion of this appellate
 court had been filed in the superior court, the case was transferred.
 On May 27, 1913, upon its being suggested by record that defendant,
 answer, had died intestate in April, 1912, and that the Chicago
 Title & Trust Co. had duly been appointed administrator of his
 estate, the court, on plaintiff's motion, entered an order requiring
 the aforementioned administrator to file a statement, and plain-
 tiff on the same day, by the court's leave. This was amended
 accordingly, providing it is made, substantially the same as those

of the original declaration, and making mention of Emerson's death. The Trust Company, as administrator, entered its appearance and filed a plea of general issue, and a special plea substantially the same as the one previously filed by Emerson during his lifetime.

On the third trial, plaintiff's evidence, as disclosed by the testimony of three witnesses, tended to show that the accident happened about 7 o'clock on the evening of August 14, 1917; that the deceased, Howard, while attempting to walk across west Madison street, at its intersection with Cicero avenue, a busy corner, was struck and run down by the automobile, moving westerly on Madison street at a speed in excess of 35 miles per hour and without sounding a horn; that the automobile was being driven by Robie, who at the time was in the uniform of a soldier; that Howard died the same evening at a hospital as the result of the injuries he received; that he was about 48 years old at the time; that he left him surviving Catherine Howard, his widow, plaintiff herein, but no children; that he was a yardmaster; that his average monthly earnings were \$225 per month; and that his death was caused by the negligence of Robie, the driver of the automobile, without contributory negligence on the part of deceased. Robie also was called as a witness for plaintiff. In response to the question as to who owned the automobile at the time, he replied that he could not truthfully answer the question, but he admitted that at the coroner's inquest, held shortly after Howard's death, he had testified that "Doctor Emerson owned the car, - George C. Emerson."

At the conclusion of plaintiff's evidence the court denied defendant's motion for a directed verdict in its favor. Thereupon Robie and Dr. William E. Kendall testified as witnesses for defendant. Robie's testimony was to the effect that at the time of the accident, and prior thereto, he was a soldier in the First Illinois Infantry, with armory at 16th street and Michigan avenue, Chicago, that he was

of the original decision, and making mention of the fact that
The Trust Company, as administrator, entered its claim against and filed
a plea of general issue, and a special plea of non-responsibility for the same as
the one previously filed by another person having the same title.
On the third day, Plaintiff's statement, as amended by
the testimony of these witnesses, seemed to show that the accident
happened about 7 o'clock on the evening of August 11, 1917, that the
deceased, having been driving in his motor car with another person
at the intersection with the street crossed, a heavy street car, which was
run down by the defendant, moving rapidly on a track across at a
speed in excess of 10 miles per hour and without sounding a horn, that
the automobile was being driven by the deceased, and at the time was in the
midst of a collision with the motor car and the same occurred at a point
on the track of the defendant's car, that the deceased was about 40 years
old at the time; that he held his driver's license number, 111
which, Plaintiff stated, was an excellent one; that he was a professional
driver and was usually driving with the motor car and that his
death was caused by the negligence of the defendant, the driver of the motor
car, which negligently and recklessly ran into the back of the automobile.
Katie also was called as a witness for Plaintiff. In response to the
question as to who owned the automobile at the time, he replied that
he could not truthfully answer the question, but he admitted that at
the moment's instant, that shortly after August 11, 1917, at the
testified that "I never saw the car and I never saw the driver."
At the conclusion of Plaintiff's evidence the court ruled
defendant's motion for a dismissal in the favor of Plaintiff.
Katie and W. William H. Russell testified as witnesses for defendant.
Katie's testimony was to the effect that at the time of the accident,
and prior thereto, he was a soldier in the United States Army,
with number 111111 and that he was a member of the United States Army.

assigned to driving the automobile for the Medical Corps of the regiment; that he was paid his regular army salary by the U. S. Government, and received no compensation from Dr. Emerson; that he received orders from members of the Medical Corps and took them in the automobile to such places as they directed; that Dr. Emerson, a major, was his superior officer and he took him in the automobile wherever Emerson directed, and that he was subject to Emerson's orders; that no other person than the witness drove the automobile; that "it stood in front of the armory and stood at the camp at Cicero and in front of my house, and wherever I was, the car was;" that on the evening of August 14, 1917, by Emerson's order, he drove him from the armory to his home; that upon arriving there Emerson ordered him to take the car to his (the witness') home "and stay there and await further orders;" and that, at the time the accident occurred, "I was obeying the order Major Emerson gave me."

Dr. Kendall's testimony was to the effect that in August, 1917, Dr. Emerson was the surgeon and senior medical officer of the regiment; that he (Kendall) was a first lieutenant and assistant surgeon of the regiment; that various members of the Medical Corps used the automobile, which always was driven by Robie; that "the regiment had no car at this time;" that the automobile, which Robie drove, "was Dr. Emerson's car;" and that, in a general way, he (Emerson) "directed the use of it."

In view of the evidence, showing that Dr. Emerson, at the time of the accident, was the owner of the automobile and that Robie then was driving it in accordance with Emerson's express directions, and in view of the holdings (above mentioned) of the 3rd division of this appellate court on the prior appeal, we are of the opinion that the trial court erred in not submitting the cause, upon said third trial, to the jury under proper instructions, and in giving the

assigned to various positions in the United States of the
 continent; that he was sent to various parts of the U. S.
 Government, and received the commission from the President that he
 received orders from various of the United States and that then in
 the automobile is much greater in many respects than the motor,
 motor, was the superior vehicle and he took him to the automobile
 wherever he went, and that he was subject to various
 orders; that he also passed into the witness stand and asked him
 what was shown in front of the motor and asked of the group of drivers
 and in front of my house, and wherever I was, the car went, that on
 the evening of August 12, 1911, he received a report, he took him from
 the country to the house that upon reaching there he found himself
 to take the car to his home, and that he was there the night
 before, and that, at the time the motor was shown, "I was
 objecting the order before he took him out."
 Dr. Hamilton's testimony was to the effect that in August,
 1911, he was sent to the country and received orders of the
 President that he (Hamilton) was a first lieutenant and assistant
 surgeon of the regiment that various members of the United States
 were the witnesses, and that they were taken to the house that "the
 regiment had no car at this time" that the automobile, which he
 drove, "was Dr. Hamilton's car," and that, on a general way, he
 (Hamilton) "driven the car at 12."
 In view of the evidence, showing that Dr. Hamilton, at the
 time of the accident, was the owner of the automobile and that he
 then was driving it in error and with intention of causing the
 and in view of the witness (Dr. Hamilton) at the trial of the
 this accident went on the trial appeal, we are of the opinion that
 the trial court acted in not admitting the motor, upon which this
 trial, so the jury must proper instructions, and in giving the

peremptory instruction complained of and in entering the judgment appealed from. In Berry on Automobiles, 5th Ed.; Sec. 1191, page 878, it is said: "The relation, creating liability in the owner, does not depend upon the driver receiving compensation for his services. In fact, liability for the negligence of a driver does not depend upon the strict relation of master and servant, but exists where the driver acts for the owner at his request, express or implied, for his benefit, or under his direction." (See Halli v. Peters, 241 N. Y. 177, 179.) In 26 Cyc. p. 1522, it is said: "A person who avails himself of the use, temporarily, of the services of a servant regularly employed by another person may be liable as master for the acts of such servant during the temporary service." (See, Wheeler v. Chicago, etc. R. Co., 267 Ill. 306, 326; Trout Auto Livery Co. v. People's Gas Co., 168 Ill. App. 56, 60; Pennell v. Dawson, 88 Conn. 710, 714; Holloway v. Schield, 294 Mo. 512, 523; Jimmo v. Frick, 255 Pa. 353, 357.)

For the reasons indicated the judgment of the Superior Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Scanlan and Barnes, JJ., concur.

32555

356 LA. 631

TOM CHAMALES,
Appellee,

v.

EMMET MAGINNIS,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On May 16, 1927, plaintiff caused to be entered in the Municipal court a judgment by confession against defendant for \$1396.25, on the latter's promissory note for \$1,000, dated September 4, 1923, and payable to plaintiff's order 60 days after date, with interest at 6 per cent per annum. The amount of the judgment was made up ^{of} the principal sum of the note, \$1,000, accrued interest of \$221.25, and attorney's fees fixed at \$175.

On October 19, 1927, defendant appeared and moved that the judgment be opened and that he be given leave to plead, etc. The motion was supported by his affidavit (appearing in the bill of exceptions) in which he alleged in substance that the first notice or knowledge that he had of the entry of the judgment was on October 19, 1927, when an execution was served upon him; that he has a good defense to the whole of the note; that he executed it "solely for the accommodation" of the payee thereof, plaintiff, and at his request; that defendant did not receive from plaintiff or any other person "any money or anything of value or any good and valuable consideration for the execution of the note;" and that the note was made "without any consideration whatsoever." From the order of the court, entered October 19, 1927, denying defendant's said motion, this appeal is prosecuted.

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By virtue of the provisions of Section 9 of our Negotiable Instruments' Act (Cahill's Stat. 1927, Chap. 98, Sec. 10, page 1733) and the holdings in Honeyman v. Jarvis, 64 Ill. 366, 372, and other cases, we are of the opinion that defendant's affidavit sufficiently disclosed, prima facie, such a defense to the note as required the court to grant defendant's motion and open the judgment and give him leave to plead and have a trial upon the merits.

Accordingly, the order appealed from is reversed and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

Scanlan and Barnes, JJ., concur.

32577

250 I.A. 631

RUDOLPH P. PERLMAN and
CHICAGO TITLE & TRUST CO.,
Trustees,
Complainants,

v.

VINCENT MARSANO et al.,
Defendants.

APPEAL FROM

SUPERIOR COURT,
COOK COUNTY.

ON APPEAL OF ALBERT P.
MECKLENBERGER, receiver,
Appellant.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the receiver, Mecklenberger, appointed and reappointed in a suit to foreclose a second trust deed on certain improved real estate in Cook county, Illinois, from an order of the Superior court, entered November 30, 1927, wherein the court disapproved certain credit items (aggregating more than \$1000) contained in the receiver's final report and account, and ordered him to recast the account so as to show a balance in his hands of said items, and further ordered him to pay to the complainant, Perlman, \$1000, "in satisfaction of the deficiency due him with lawful interest thereon from September 27, 1924," and also to pay certain other enumerated sums for master's fees, etc., taxed as costs.

In complainants' amended bill to foreclose, filed July 14, 1924, it is alleged in substance that on May 18, 1922, Marsano executed and delivered his note for \$27,500, and said trust deed securing the same; that the amount of the note and certain interest is due and unpaid, as well as certain taxes for the year 1923; that

Perlman is the legal holder and owner of the note; that Philip B. Golde and Philip J. Goldberg are the owners of the equity of redemption; and that there is a first mortgage of \$75,000 upon the premises running to Greenebaum Sons Bank and Trust Co., as trustee. The bill prayed for the appointment of a receiver to take charge of and to preserve the premises, and to collect the rents, issues and profits thereof. A copy of the trust deed was attached to the bill as an exhibit. By its terms Marsano conveyed and warranted, subject to said first mortgage, to the Chicago Title & Trust Co., as Trustee, the real estate in question with improvements thereon, "together with all rents, issues and profits of said premises." And it was provided that the grantor (Marsano) "waives all right to the possession of, and income from, said premises pending such foreclosure proceedings, and agrees that, upon the filing of any bill to foreclose this Trust Deed, the court in which such bill is filed may at once and without notice * * appoint a receiver to take possession or charge of said premises with power to collect the rents, issues and profits of said premises."

On the same day the bill was filed Mecklenberger was appointed receiver and he took possession. By the order he was authorized to make leases, collect all rents, etc., and it was provided that both he and his solicitor should act without compensation for their services.

On September 27, 1934, a decree of foreclosure and sale was entered. In the decree the court found inter alia that Perlman was the legal holder and owner of the principal note; that Golde and Goldberg were the owners of the equity of redemption by mesne conveyances from Marsano; that there was due Perlman \$30,365.36, with interest; that Marsano was personally liable for the payment

Section is the legal holder and owner of the same; and shall be

held and held by the said company in the name of the said

company, and that there is a full and complete transfer of the

property and interest in the same to the said company, and that

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thereof; and that in and by said trust deed Marzano conveyed the premises with the improvements thereon "together with the rents, issues and profits of said premises." After ordering a sale in the usual manner the court further ordered that

"in case, after the coming in and confirmation of said master's report of sale, any deficiency is shown in the amount due to complainant, R. P. Perlman, his rights and remedies against the rents and income of said property for the collection of said deficiency shall in no way be affected by this decree, and he shall be entitled to a receiver for said rents and profits during the period of redemption herein for the purpose of collecting any such deficiency."

On November 8, 1924, the master's report of sale and distribution was filed and the court entered an order approving and confirming the same. The report showed that a sale of the premises for \$29,721.95 had been made to the complainant, Perlman, and that, after making distribution as provided in the decree of September 27, 1924, there was a deficiency of \$1000. On the same day, on motion of Perlman, the court entered an order reappointing Mecklenberger receiver during the period of redemption. In the order he was directed to collect the rents from the premises during said period, and was given certain other powers, specifically enumerated, in none of which was included the power to pay any interest on the first mortgage during said period, or to pay any taxes other than the general taxes levied against the premises during said period. In the order it was further provided that during said period the defendants, their agents and attorneys, be enjoined from collecting any rents or from interfering in any manner with the receiver's possession; that the receiver retain all moneys coming into his hands by virtue of his reappointment until further order of the court; and that Perlman be not required to furnish a complainant's bond, it appearing to the court that he "has an undisputed right to the reappointment of the receiver herein."

Under this order Mecklenberger continued to act as receiver. About the time of its entry Perlman, the purchaser of the premises at the master's sale, had assigned the certificate of sale, which had been issued to him, to Marzano. Subsequently, on December 1, 1924, and on June 17, 1925, Mecklenberger, as receiver, filed current accounts, and on September 26, 1925, filed his final account and asked for its approval. Objections to certain credit items contained in this final account were filed by both Perlman and Marzano. None of these accounts is contained in the present transcript, and there are statements of the clerk of the Superior court that all three accounts have "been lost from the files and cannot upon diligent search be found." Among other credit items contained in this final account, to which they objected, Perlman and Marzano, each severally, objected to the allowance of the following items:

| | |
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| "Payment to Greenebaum Sons' Bank & Trust Co.,
on account of interest | \$895. |
| Payment to said bank on past due interest | 31.25 |
| Paid to said bank on account of interest | 500.00 |
| Paid to said bank on account of income tax | 99.40." |

The aggregate sum of the above items is \$1525.65, more than \$500 over the amount of the \$1000 deficiency at the time of the sale. On May 7, 1926, Mecklenberger, as receiver, filed another final report and account, which is contained in the present transcript, and asked that he be discharged as receiver, etc. In the account he debited himself with amounts received from rents, etc., during the months of June, July, August and September, 1925, in the total sum of \$3226.18, and credited himself with nine items of disbursements, aggregating the sum of \$3,274.57, or \$48.39 more than he received during said months, which, he said, was the exact balance of cash he had on hand at the time of rendering his last current account, filed June 17, 1925. Among these nine credit items were the four items above mentioned, aggregating \$1525.65, three of which were for payments to the Greenebaum Sons' Bank on account of interest on

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said first mortgage, and which payments, as the account discloses, were made to the bank respectively on July 15, September 15, and June 15, 1926, - all subsequent to the sale of the premises pursuant to the foreclosure decree and to the order reappointing the receiver after the approval of the foreclosure sale. These payments were made without any authority contained in said order of reappointment. And it does not appear that the court by any subsequent order authorized or sanctioned such payments. Both Perlman and Marzano severally filed objections to the allowance of certain credit items contained in said second final account, including said four items, and asked that the receiver be charged with a sum sufficient to pay said deficiency of \$1000, and interest thereon, and, on May 17, 1926, the court ordered that said second final account and said objections be referred to a master to take proofs and report the same together with his conclusions.

Evidence was introduced before the master, and on October 25, 1927, he filed his report, in which, after stating the facts substantially as above outlined, he recommended to the court that the objections to the allowance to the receiver of said four credit items, aggregating \$1525.65, be sustained, but that the objections to the allowance of certain other credit items be overruled. In the report of the master is contained the following statement:

"It appears from the evidence that complainant, Perlman, the purchaser at the master's sale of the premises, assigned the Certificate of Sale issued to him * * to the defendant, Marzano, and it is contended by counsel representing the receiver on the reference herein that such assignment carried with it the deficit, evidenced by the deficiency decree, of \$1000, and that, because thereof, the objectors have no standing in this court and no right to enforce payment of the deficiency of \$1000 from moneys collected by the receiver. The master finds, however, that the assignment of the Certificate of Sale did not carry with it the deficit, * * and that complainant, Perlman, has the right to have paid to him the balance due of \$1,000, and that the defendant, Marzano, has the right to have his objections sustained to the final account and report of the receiver."

and that property, and which property, as the property of the
 were made as the said property on July 12, September 12, and
 June 12, 1937, - all references to the sale of the property
 to the Foreclosure House and to the order suspending the property
 after the approval of the Foreclosure will. These payments were made
 without any intention to make any of the property, and
 it was not agreed that the money by any subsequent order retained
 or mentioned with payments. The balance was retained
 after objection to the statement of certain items retained
 in full before final judgment. Including said four items, and some
 that the receiver be charged with a sum not being to pay said
 debtors of \$1000, and interest thereon, and on July 17, 1937, the
 court ordered that said amount final payment and said objection to
 referred to a matter to the court and report the same together
 with his decision.

Thereafter the defendant made the report, and on October
 20, 1937, he filed his report. In which, after stating the facts and
 essentially as above recited, he recommended to the court that the
 objection to the statement to the receiver to said four items be
 overruled. He stated, but that the objection to the
 statement of certain other items be overruled. In the report
 of the matter is contained the following statement:

"It appears from the evidence that defendant,
 herein, the defendant to the matter to the court, and
 assigned the defendant on this matter as his right to the
 defendant, herein, and it is recommended by the court
 recommending the receiver on the defendant herein that such
 amount be retained with it and held, subject to the
 defendant's order, of \$1000, and that, however, the court,
 defendant have no right to this money and no right to
 interest payment of the defendant of \$1000 from the
 defendant by the receiver. The matter herein, however,
 that the defendant of the defendant of said \$1000 money
 with it the defendant, and that defendant, herein, has
 the right to have said \$1000 from the defendant, and
 that the defendant, herein, has the right to have his objection
 sustained to the final account and report of the receiver."

No objections to said master's report and recommendations were filed with the master, but after said report had been filed in court, on motion of the receiver, he was allowed to file instant objections to the report with the same effect as if they had been filed in apt time before the master and overruled, and he did so, and the objections were ordered to stand as exceptions. He contended therein that he was entitled to be credited in his final account with said four items, aggregating \$1525.65; that complainant, Perlman, had no right to be paid any sums, out of moneys collected by the receiver, on account of the deficiency of \$1000, because he had waived that right or was estopped to object to the receiver's final account; and that Marzano also was estopped to raise any objections to said account. After reviewing the evidence we fail to find sufficient evidence to support the contentions of either waiver or estoppel. Following a hearing on the receiver's exceptions the court approved and confirmed the master's report, and entered the order appealed from.

We think that the order was right and should be affirmed. Under the provisions of the trust deed the rents were pledged for the payment of the indebtedness due to Perlman. Upon the foreclosure sale there was a deficiency of \$1000. This deficiency was payable out of the rents collected by the receiver under his reappointment during the period of redemption. (Prussing v. Lancaster, 234 Ill. 462, 467; Continental etc. Bank v. Leven, 213 Ill. App. 310, 314.) Neither under the order reappointing the receiver, nor by any subsequent order of the court, was he authorized to pay out of the rents collected during the period of redemption any interest on the prior mortgage to the Greenebaum Sons' Bank, and he was not authorized by law so to do. (Stevens v. Hadfield, 196 Ill. 253, 255; Wright v. Matters, 220 Ill. App. 131, 143.)

The order is affirmed.

AFFIRMED.

Scanlan and Barnes, JJ., concur.

250 I.A. 632

32617

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. G. H. GLINKE,
Appellee,

v.

CITY OF CHICAGO and CHRISTIAN
PASCHEN, Building Commissioner,
Appellants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the City of Chicago and its Building Commissioner, Christian Paschen, from a judgment of the Superior court, entered February 23, 1928, awarding a writ of mandamus in favor of the relator, Glinke, whereby said commissioner was commanded forthwith to issue a permit to Glinke for the construction of a public garage at Nos. 8136-44 Dobson avenue, Chicago. The premises are on the west side of said avenue, a north and south street, between 81st and 82nd street. To the petition for mandamus, filed February 6, 1928, defendants filed a joint and several answer. To an amendment to the petition defendants also filed an answer. There was a hearing in open court at which petitioner and two witnesses for him testified. One witness testified for defendants and much documentary evidence was introduced by both parties.

It is alleged in the petition in substance that on January 11, 1928, petitioner presented plans for the construction of a garage on the premises and applied for a building permit; that theretofore he had secured a sufficient number of frontage consents for the construction of the garage and had submitted the same to the Building Commissioner; that all departments of the

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favor of the relief fund, monthly with acknowledgment card, during February, 1934, according to order of committee in connection with the fund, from a payment of the relief fund. This is an appeal to the work of the fund and the following

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There was a meeting in April 1964 at which participants were two who
because they had decided. The others decided to attend
and were accordingly advised as follows by their parents.

10- It is alleged that the persons in question were on January 11, 1967, killed by the police and the military.

There is no doubt that the Commission has been very helpful in the past and will continue to be so in the future. The Commission has been very helpful in the past and will continue to be so in the future.

Department of Buildings, except the structural engineer, approved said plans on January 11th; that on January 13th petitioner was informed that the structural engineer, who had "O.K.ed" the plans, was absent temporarily from his duties and had the plans in his possession - thereby making it impossible to have a building permit issued on that day; that between January 13th and January 16th four of the signers of said frontage consents made written protests against the construction of the garage; that on January 16th, upon petitioner again applying for a building permit, he was informed of the protests and that, by reason thereof, the permit would have to be withheld by the Building Commissioner; that neither of the parties so protesting had withdrawn their said consents previously presented; that the Commissioner unlawfully withholds the issuance of the permit; and that petitioner is entitled to a writ of mandamus, etc.

In defendants' answer they admitted the presentation of the plans by petitioner to the Building Department, that they had been approved to the extent as stated and that the Commissioner had refused to issue the permit. They alleged in substance that the reason for such refusal was that certain property owners, who had signed frontage consents, had filed protests against the issuance of the permit and had shortly thereafter filed withdrawals or revocations of their said consents. Defendants denied that petitioner had sufficiently complied with the ordinance relating to the issuance of building permits. Attached to the answer were various exhibits, being copies of a report of the map department as to the frontage consents, said consents, the protests, the revocations, and other documents.

On the hearing defendants introduced in evidence a certified copy of the city ordinance, passed June 30, 1926, amending section 929 of the Chicago Municipal Code of 1923, which ordinance as amended is in part as follows:

Department of Education, under the educational system, approved
said plan on January 11th and on January 11th petition was
informed about the situation, and the "B.L.A." the plan.
was almost immediately from the office and the plan to his
possession - thereby making it impossible to have a building permit
issued on that day. That petition January 11th and January 11th from
of the office of said building department made within previous minutes
the cancellation of the permit that on January 11th. Upon petition
again applying for a building permit, he was informed of the previous
and that, by reason thereof, the permit would have to be issued by
the Building Commissioner; that petition of the petition no provision
had although that said petition previously requested that the
Commissioner voluntarily withdraw the issuance of the permit and
that petition is entitled to a writ of mandamus, etc.
In testimony, witness that advised the presentation of the
plans by petition to the Building Department, that said plans
approved in the event he should not and the Commission had refused
to issue the permit. They claimed to witness that the reason for
such refusal was that certain property owners, who had signed letters
concerning, that said petition against the issuance of the permit and
had thereby prevented that petition to proceed to that said
committee. Petitioner stated that petition had voluntarily complied
with the ordinance relating to the issuance of building permits.
testimony to the court were various exhibits, being copies of a report
of the city engineer as to the property owners, said exhibits, the
petition, the ordinance, and other documents.
On the hearing evidence introduced in evidence a certified
copy of the city ordinance, passed June 25, 1916, providing for the
of the Building Department, June 27, 1916, which ordinance as amended is
in part as follows:

"It shall not be lawful * * for any person, firm or corporation to hereafter locate, build, construct or establish any garage in the city on any lot in any block in which dwelling houses, apartment houses and hotels constitute one-half or more of the buildings on both sides of the street in the block, or within 100 feet of any such street in any such block, without the written consent of a majority of the property owners according to frontage on both sides of the street; provided, that all lots which abut only on a public alley or court shall be considered as fronting on the street to which such alley or court leads. It shall not be deemed inconsistent with the character of a building as a dwelling house, apartment house or hotel under this section that a part thereof is used for retail business purposes, if a separate part of such building with a total floor area greater than the floor area used for business is used for residence purposes. Frontage consents, when required under this section, shall be obtained and filed with the commissioner of buildings before a permit is issued for the construction of any such building; provided, that in determining whether dwelling houses, apartment houses and hotels constitute one-half or more of the buildings on both sides of the street in any block, any building fronting upon another street and located upon a corner lot shall not be considered; and provided further, that the word 'block,' as used in this section, shall not be held to mean a square, but shall be held to embrace only that part of the street in question which lies between the two nearest intersecting streets."

It appeared from the evidence that the proposed garage was to be erected on the west side of Dobson avenue, between 81st and 82nd streets, on lots known (otherwise than by said street numbers above mentioned) as "lots 15, 16, 17 and 18 in block 130 in Cornell, a subdivision, etc."; that there were twenty-three lots in said block, numbered 1 to 23 inclusive, on the west side of Dobson avenue between said streets; that each of these lots was of the width of 25 feet, except lot 1, which was of a width of 30.06 feet, and except lot 23, which was of a width of 37.06 feet; that there were four dwelling houses, each on lots 1, 2, 3 and 5 respectively; that lot 4 and lots 6 to 18 inclusive were vacant lots; that on lots 19 and 20 there was a store-building in process of construction; and that on lots 21, 22 and 23 there were stores and apartments above, the dwelling area of which building was twice that of the floor area used for business. It further appeared that on the east side of Dobson avenue, beginning at 81st street and going south to an alley, all the lots, being in

block 129 of said subdivision and each being 25 feet in width, were vacant lots; that between said alley and 32nd street there were eighteen lots, numbered 8 to 25 inclusive, each being 25 feet in width, with the exception of lots 24 and 25, which were respectively of a width of 27 and 28 feet; that there was a public garage on lots 11 to 15 inclusive and an old dwelling house on lot 18; and that there were no buildings on the remaining lots in said block 129, which fronted on Dobson avenue. It is clear that, under the provisions of said ordinance, the relator, before he could legally obtain a permit for the construction of the proposed garage, would have to obtain and file with the building commissioner the written frontage consents of a majority of the property owners, according to frontage, on both sides of Dobson avenue, between 31st and 32nd streets.

It further appeared that the relator, having secured the written consents for the erection of the proposed garage of certain property owners on both sides of Dobson avenue between said streets, filed said consents with the Commissioner about January 3, 1928; that the total property frontage was 1169.12 feet, of which a majority thereof was 587.57 feet; that the relator did not have on said consent document a majority of said frontage consenting, and, accordingly, he was so advised; that thereupon he filed a second consent document containing additional signatures with the Commissioner, who submitted the same for checking to the map department, which rejected one of the consents, but, nevertheless, found a surplusage of frontage consenting of 17.43 feet over a majority of the total frontage, and so advised the Commissioner; that about January 11th the relator submitted the amended plans for the garage to various departments of the Department of Buildings and obtained the approval thereof by all except the engineering department; that about January 16th he obtained the approval of said engineering department and again applied at the

[illegible]

Commissioner's office for the issuance of the permit; that it was refused for the reason that four of the property owners, owning 225 feet of frontage, and who had previously signed their frontage consents, had filed with said Commissioner a written protest against its issuance; that on January 17th there was a hearing before the Commissioner, at which the relator and some of the property owners were present; that the relator demanded the permit and argued that said protest of the four property owners was not in fact a revocation of the consents which they had previously signed; that no final action then was taken by the Commissioner; that on the following day, January 18th, said four property owners signed and filed in the Commissioner's office a document, stating that they had previously signed a consent for the erection and maintenance of said garage and that "we do hereby revoke, cancel and withdraw our said consent and do hereby declare said consent wholly null and void and of no effect whatsoever;" and that thereupon the Commissioner finally acted and refused to issue the permit to the relator.

"It is well settled that a writ of mandamus should never be awarded unless the party applying for it shows a clear right to have the thing sought by it done; nor unless it is the clear duty of the party, sought to be coerced, to do the thing he is called upon to do." (McCann v. The People, 194 Ill. 526, 554.) We think that under the facts disclosed in the present case the court erred in granting the writ. By the terms of the above mentioned ordinance, before the relator could legally be entitled to the issuance of the permit demanded, it was necessary that he should obtain the written consent thereto, filed with the Building Commissioner, of a majority of the property owners according to frontage on both sides of Dobson avenue, between 81st and 82nd streets. Before the commissioner in good faith

had finally acted upon the application for the permit, four of the property owners, owing 225 feet of the frontage, withdrew and revoked the consents to the erection of the garage which they had previously given. By the withdrawal of these consents the relator did not have a majority of the property owners, according to frontage, consenting to the erection of the garage. It is well settled by numerous decisions in this State and elsewhere that consents given under the provisions of similar ordinances or statutes may be withdrawn at any time previous to final action being taken by the official or tribunal required to act in the premises. (38 Corpus Juris, p. 75, sec. 6; Littell v. Board of Supervisors, 198 Ill. 205, 208; Theurer v. People, 211 Ill. 296, 303; Kinslee v. Pogue, 213 Ill. 302, 306; Mack v. Peleeat Drainage District, 216 Ill. 56, 59; People v. Walsh, 195 N.Y. Supp. 264, 266.)

The judgment appealed from should be reversed and it is so ordered.

REVERSED.

Scanlan and Barnes, JJ., concur.

33679

250 I.A. 632²

MAURICE ALSCHULER,
Appellee,

vs.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

HARRY R. FIELD & CO., a
Corporation, HARRY R. FIELD
and WILLIAM SASSERMAN,
Appellants.

MR. PRESIDING JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

In an action in quasi for fraud and deceit in the sale to plaintiff of certain eggs, there was a verdict finding the three defendants guilty and assessing plaintiff's damages at \$1200.96. On February 4, 1928, judgment was entered upon the verdict and defendants appealed.

The action was commenced on July 16, 1926. In the one count of plaintiff's declaration it is averred in substance that in March, 1923, defendants were, and for a long time had been, engaged in a brokerage business in Chicago, buying and selling eggs in carload lots on commission for persons desiring to trade in the egg market; that there then existed several grades or classifications of eggs, among which were those characterized as "storage packed firsts" and "current receipts;" that on March 26, 1923, the market price for eggs of the first mentioned grade was approximately 25 cents per dozen, and of the second mentioned grade approximately 22 cents per dozen; that plaintiff then was ignorant of the grades and market prices, of which fact defendants had knowledge; that defendants, intending to cheat and defraud plaintiff, "falsely represented and warranted" to him that they would purchase for his account two carloads of eggs at the prevailing market price of 25 cents per dozen; that, relying upon these representations, "he was induced," and authorized defendants to purchase for him at said price two carloads of eggs. of the

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...the fact that the *in vitro* and *in vivo* results are in good agreement.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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Suppose that α and β are real numbers, $\alpha < \beta$, and $\alpha \neq \beta$. Then

Journal of Management Education 34(10) 1101-1114

Source: *Journal of the American Statistical Association*, 1974, 69, 1, 1-11.

... ..

Number 80 shows it contained information from Volume 6.

and that the \mathcal{H}^1 -norm of the difference between the two functions is bounded by a constant times the distance between the two points.

well) estimated for the lowest 100 km of the well.

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These results indicate that the use of the proposed model is effective in predicting the behavior of the system.

and is one of the best and most useful of all the

grade known as "storage packed firsts," and he paid to them the sum of \$1200.96 on account of the purchase; that it was defendants' duty to purchase eggs for him of that grade, but that they, dis-regarding their duty, did not purchase "storage packed firsts," but on the contrary sold to him two carloads of the inferior grade of "current receipts," without disclosing to him said grade or quality although they billed the eggs to him at the price of 25 cents per dozen; that plaintiff, upon learning of the fraud and deceit practiced upon him, promptly, on November 1, 1923, rescinded said sale and demanded of defendants the return of the purchase price so paid, viz., \$1200.96, but that they have failed and refused to return the same, to plaintiff's damage, etc. The defendants filed a plea of the general issue.

Upon the trial, had in January, 1923, plaintiff testified in his own behalf, as did two witnesses for him, - Wagner, an inspector of eggs in Chicago, and Fuller, an egg broker. Wasserman and Field were witnesses for themselves, respectively, and defendants called two other witnesses, the treasurer and the book-keeper of the defendant corporation. Defendants also sought to introduce in evidence a certain verified bill for an accounting and for a receiver, or certain paragraphs thereof, filed by plaintiff in said circuit court in November, 1923, against Field, trading as Harry H. Field & Co., and Wasserman, individually, but the court refused to admit the same in evidence. The bill was based upon the same transaction as is complained of in the present case. In paragraph 16 of the bill it is stated that "your orator has now, as he is advised, a right to rescind the purchase of said eggs, but is none the less willing to permit the sale of said eggs at the current market price and accept an accounting thereof," etc. It will be noticed from the statement that in November, 1923,

about eight months after the sale of the eggs, plaintiff had not then elected to rescind the sale.

Inasmuch as we have reached the conclusion, after a review of the evidence contained in the present transcript, that the judgment cannot stand as against Harry B. Field, individually, and, being a joint judgment against him and the two other defendants, must also be reversed as to said two other defendants (Livak v. Chicago & Erie R. Co., 399 Ill. 218, 226; Seymour v. Richardson Fueling Co., 305 Ill. 77, 82) and the cause remanded for a new trial, we refrain from outlining the evidence, further than to say that it appears that plaintiff is an attorney and a brother in law of Wasserman; that defendant corporation, of which Field is president, was engaged at the time of the transaction complained of in the business of buying and selling eggs and other produce; that Wasserman was associated with the corporation, sharing in the profits and losses on transactions consummated by him on the corporation account, and that he negotiated the particular sale to plaintiff; and that Field, personally, did not participate in the sale or know anything about it until long after its consummation, or as to any claimed fraud on the part of Wasserman. In 14 A Corpus Juris, p. 176, par. 1955, it is said: "An officer or director of a corporation is not liable for its torts where he has not participated therein, or had any knowledge of, or given any consent to, the act or transaction. *** Likewise, a director or officer is not, merely by virtue of his position, liable in all cases for the torts of other directors, officers or agents; he is liable when, and only when, he participated in the tortious act, authorized or directed it, or acquiesced in it when he either knew, or by the exercise of reasonable care should have known of it, and should have objected and taken steps to prevent it." (See, also, Peck v. Cooper, 8 Ill. App. 403, 408; Folwell v.

Miller, 145 Fed. Rep. 495, 496.)

And we are of the opinion that the court erred in refusing to admit in evidence plaintiff's verified bill in chancery, or at least paragraph 16 thereof above mentioned. (Kankakee, etc. R. Co. v. Moran, 131 Ill. 283, 304; Hobbs v. Butler, 24 Id. 337, 427; Anderson v. Chicago T. & S. Bank, 195 Id. 341, 349). It showed an admission by plaintiff, even as late as November, 1923, when he had full knowledge of the facts which, as he claims, disclosed fraud on the part of Wasserman and Field, that he did not then elect to rescind the sale. In the Anderson case, supra, it is said, "One who has thus been led into a transaction by means of fraud, may, if he choose, after a full knowledge of the fraud, yet elect to affirm the contract, and after such election is once deliberately made, with full knowledge of all the facts, he will not be allowed to shift his position and seek a rescission." The evidence disclosed that plaintiff purchased the eggs on a speculation, thinking the price thereof would advance in the future, and that at the time of the sale he was furnished with full details as to the lot numbers, etc., and was informed as to the place where they were stored for his account. Yet he did not examine the same within a reasonable time so as to determine the grade or condition thereof, and he did not promptly notify any of the defendants of his intention to rescind the sale on the ground of the claimed fraud therein. It is well settled that a party desiring to rescind a sale for fraud must, upon discovery of the fraud, act promptly, announce his purpose and adhere to it, and he cannot be permitted to stand passive and speculate as to whether he will rescind or waive the fraud, as the events of the future may determine it to be the most profitable for him to do. (Pollett v. Brown, 136 Ill.

Bill, the first day, 1881.

And we are of the opinion that the report should be

referred to the committee on the subject of the

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244, 247.)

Defendants' counsel also contend that the judgment should be reversed because the trial judge erroneously made certain disparaging remarks in the jury's presence regarding defendants' principal witness, Wasserman, and because the judge improperly reproved defendants' attorney during his closing argument to the jury. It is unnecessary to discuss these contentions, for, if the judge did commit reversible errors in the particulars mentioned, as to which we express no opinion, they are not likely to occur on another trial.

For the reasons indicated the judgment of the circuit court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Scanlan and Barnes, JJ., concur.

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250 I.A. 632³

JAMES G. SHERIDAN,
Appellant,

v.

JAMES H. POAGE,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE GAILLEY DELIVERED THE OPINION OF THE COURT.

In a fourth class action in contract, commenced in the municipal court on January 5, 1928, and tried without a jury, the court, on March 2, 1928, found the issues on plaintiff's statement of claim and defendant's set off against plaintiff and assessed defendant's damages at \$122.16. Judgment was entered on the finding against plaintiff, and he appealed.

As shown by plaintiff's statement of claim he sought to recover of defendant, by virtue of a written contract entered into between the parties on September 15, 1926, the net sum of \$477.37. At that time the defendant, Poage, as a member of the law firm of Cannon & Poage, was practicing law in Chicago. He recently had been employed to render certain services in the office of the city attorney of Chicago, and was desirous of procuring the services of plaintiff, also an attorney in Chicago, to assist him in doing his part of the business of said law firm.

It is first stated in the contract that Poage is the owner of a one-half interest in the firm and business of Cannon & Poage, and that the parties have agreed that Poage shall employ Sheridan and he shall enter into the work and service of Poage. It is then agreed that Sheridan "shall receive out of the net profits" of Poage "a sum equal to \$100 per month, if said net profits are sufficient to pay

same (not guaranteed), same to be paid either monthly or semi-monthly if receipts show sufficient net profits to meet said payments," - Sheridan being at all times entitled to information as to receipts and expenses. It is further agreed that, "after the said \$100 per month has been deducted from the share of the net profits of said business of Cannon & Peage accruing to" Peage, Sheridan "shall be entitled to half of the remainder of the share of Peage in the business by way of fees earned and collected, until same shall amount to an additional \$200 per month (not guaranteed), said amount to be determined at the expiration of this contract, however, or in what manner, this said contract may be terminated." It is further agreed that Sheridan shall enter on the partnership's books, promptly at the time of the finishing of any business, a charge for services, and if desirable, a charge on account for work partially completed, and send a bill for the same at the end of each month, or sooner if desirable, and keep a record or diary of matters handled by him, accessible to both parties; that if any fees are paid on unfinished business in the partnership during the term of Sheridan's said employment, he (Sheridan) "shall be entitled to his share of said fees, the same to be treated as fees earned and collected;" that, if this contract is terminated by notice or expiration, Sheridan shall not be entitled to any fees from Peage, or from the business of Cannon & Peage, "on any unfinished business, whether said fees be earned or not, unless said fees are then collected;" that Sheridan is authorized to do any law business of his own, and that the fees and profits from such personal business, if any, shall be divided equally, - "the object of this clause being to prevent Sheridan from devoting too much time to his own business and too little to the partnership business;" and that "this agreement shall be in force for one year from and after

September 15, 1926, unless sooner terminated * * by either party giving to the other 60 days notice in writing of his intention to terminate the same."

At the trial plaintiff introduced the contract in evidence, and testified in substance that after preliminary negotiations the contract was drafted by Poage and signed by both parties on the day of its date; that plaintiff immediately started work thereunder and continued in the work until the expiration of the period of the contract, September 15, 1927, or a few days thereafter; that during the year he had been paid by Poage, at the rate of \$100 per month, the total sum of \$1200; that about September 17th he demanded of Poage a final settlement; that Poage said he still was busily engaged in work in the city attorney's office but expected soon to leave, and suggested that for a time plaintiff continue to work, saying "finish up such matters as you are now handling and I will include this in the settlement;" that plaintiff acquiesced in the suggestion and, after Poage had severed his connection with the city attorney's office, the parties met early in December, 1927, and figured from the books Poage's one-half share of the net profits of the firm of Cannon & Poage; that both then agreed that such share was \$3055.74; that plaintiff contended that, under the terms of the contract, from such share should first be deducted the \$1200 (which Poage had paid to him) leaving a balance of \$1855.74, and that such balance should be divided equally between them, or \$927.87 to plaintiff; that plaintiff further said that, as he had earned as fees in his personal business the sum of \$900, one-half of this amount, or \$450, should be deducted from said sum of \$927.87, leaving a net balance due to plaintiff of \$477.87; that Poage said that he did not so construe the contract, and contended that plaintiff was only entitled to one-half of said share of said

giving to the other 22 have value in relation to the interest in

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profits, or \$1827.87, from which should be deducted the \$1200 already paid to plaintiff, leaving a balance of \$327.87 due to plaintiff, and that, as Poage was entitled to receive \$450 (one-half of said \$900), plaintiff was in his debt to the extent of the difference, or \$122.13; that plaintiff did not agree to Poage's construction of the contract; that thereafter Poage suggested that each party draft a written statement setting forth their respective contentions and submit the same to arbitration, to which suggestion plaintiff agreed; that thereafter statements (introduced in evidence at the trial) were drafted and considered by the parties; that subsequently Poage said that he had changed his mind and decided not to submit the controversy to arbitration, and offered \$100 to plaintiff in settlement and a new contract for another year, both of which offers plaintiff refused; and that Poage finally refused to pay plaintiff's claim, resulting in the commencement of the present action.

Although Poage alleged in his affidavit of merits that plaintiff was indebted to him in the net sum of \$122.13 (the same figure given to plaintiff in said December, 1927, interview) yet, in his amended statement of set-off, filed on the eve of the trial, he increased that sum for certain reasons therein outlined to \$422.16, and further alleged in substance that both parties in acting upon the contract had construed it differently than according to the terms as contended for by plaintiff. Upon the trial he gave certain testimony, denied by plaintiff, as to why plaintiff's net indebtedness to him should be so increased, but it is apparent from the court's finding that the court saw no grounds for such increase, and we think that such ruling was amply sustained by the evidence.

But we are of the opinion, when all the provisions of the written contract sued upon are considered, that the court erred in adopting Poage's original construction of it and entering

the finding and judgment in his favor for \$122.16. We think that the court, under the contract and the evidence, should have entered a finding and judgment against Poage for \$477.87. It is undisputed that Poage's one-half share of the net profits of the firm of Cannon & Poage was \$3055.74, and that Poage paid to plaintiff during the year at the rate of \$100 per month the total sum of \$1200. The contract contains the provision that "after the said \$100 per month has been deducted from the share of the net profits of said business of Cannon & Poage accruing to said party of the first part (Poage), the party of the second part (Sheridan) shall be entitled to half of the remainder of the share of the party of the first part in the business by way of fees earned and collected," etc. This provision is clear and unambiguous. Deducting from said sum of \$3055.74, the sum of \$1200, the balance is \$1855.74, one-half of which is \$927.87. As Poage, under another provision of the contract, was entitled to one-half of the fees earned by plaintiff in his personal law business, and as the undisputed evidence disclosed that those fees amounted to \$900, it is clear that from said sum of \$927.87 there should be deducted \$450, leaving a net balance due to plaintiff of \$477.87.

In Clark v. Mallory, 185 Ill. 227, 232, it is said:

"While courts will uniformly endeavor to ascertain the intentions of the parties in construing a contract between them, and for that purpose will look into the surrounding circumstances at the time the contract was executed if the language of the instrument is ambiguous or its meaning uncertain, still when the language employed is unequivocal, although the parties may have failed to express their real intention, there being no room for construction, the legal effect of the instrument will be enforced as written. Intention of the parties is not to be determined from previous understandings or agreements, but must be ascertained from the instrument itself

which they execute as their final agreement, otherwise written evidence of an agreement would amount to nothing." (See, also, Davis v. Fidelity Fire Ins. Co., 208 id. 375, 382; Auditorium Ass'n v. Fine Arts Building, 244 id. 532, 538.) In Hancock v. Knights of Security, 303 id. 66, 73, it is said: "Courts do not make contracts for parties who are fully capable of making their own agreements, and if there is no ambiguity about a contract the courts cannot permit a construction contrary to its terms."

Accordingly, the judgment of the municipal court will be reversed, and, the cause having been tried without a jury, this court will here enter a judgment which the trial court should have entered (Manistee Lumber Co. v. Union National Bank, 143 Ill. 490, 504), viz, a judgment in favor of the plaintiff, Sheridan, and against the defendant, Peage, for \$477.87, and costs.

JUDGMENT REVERSED AND JUDGMENT HERE AGAINST
DEFENDANT FOR \$477.87, WITH FINDINGS OF FACTS.

Scanlan and Barnes, JJ., concur.

32697.

FINDINGS OF FACTS.

We find as facts that the parties executed the written contract sued upon on September 15, 1926, and thereafter acted upon it; that plaintiff complied with its terms and provisions to be by him performed; that during the year of its existence and in accordance with its terms defendant paid to plaintiff in installments the total sum of \$1200; that during said year defendant's one-half share of the net profits of the firm of Cannon & Poage was \$3055.74, out of which defendant caused to be paid to plaintiff said sum of \$1200; that during said year plaintiff received in fees from his personal law business the total sum of \$900 and accounted for one-half thereof to defendant; and that defendant is indebted to plaintiff in the net sum of \$477.87.

1927.

VICTIMS OF THE...

On June 10, 1927, the police searched the victim's
apartment and found a large sum of money, including a check
for \$100.00, which was given to the victim by the
person who had been arrested. The victim stated that
he had been paid by the person who had been arrested
in connection with the case of the victim's
murder. The victim stated that the person who had
been arrested was the person who had been paid by
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the person who had been arrested was the person who
had been paid by the person who had been arrested.

32719

WALENTY SZEFEC,
Appellant,

v.

ELIZABETH SZEFEC, individually
and as administratrix of the
estate of Maryan Szefc, deceased;
LAWRENCE WISNIEWSKI, as administrator
de bonis non of said estate; and
HELEN SZEFEC, a minor,
Appellees.

250 I.A. 632⁴

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT:

This is an appeal by the complainant in a foreclosure proceeding from a decree of the circuit court, entered January 17, 1928, wherein the court refused to follow the recommendation of the master that a foreclosure be had, etc., sustained the exceptions to the master's report of Elizabeth Szefc and Wisniewski, as administrator, etc., and dismissed complainant's bill for want of equity.

The bill, filed July 29, 1926, alleges that on October 8, 1921, Maryan Szefc in his lifetime executed and delivered to complainant his note for \$3000, payable on or before 5 years after said date with interest at 6 per cent. per annum, payable semi-annually; that to secure the note he executed and delivered a trust deed, conveying certain improved land in Cook county, Illinois, to complainant as trustee; that complainant is still the legal holder and owner of the note; that it was provided in the trust deed that, if at any time default should be made in the payment of the interest due on the note, then, at the option of the legal holder, the whole of the principal and accrued interest should immediately become due and payable; that default has been made in the payment of interest and complainant has elected to declare the principal and all accrued interest immediately due and payable; and that there is now due to complainant the total sum of \$3,862.50; that Maryan Szefc, who was the son of complainant, died intestate on August 6, 1924, leaving

2501A.033

THE UNITED STATES OF AMERICA

IN SENATE

COMMITTEE ON INTERIOR AND TERRITORY

REPORT

ON THE

PROCEEDINGS OF THE

COMMISSIONERS OF THE GENERAL LAND OFFICE

IN THE YEAR 1891

AND THE

LANDS BELONGING TO THE UNITED STATES

IN THE YEAR 1891

AND THE

LANDS BELONGING TO THE UNITED STATES

IN THE YEAR 1891

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LANDS BELONGING TO THE UNITED STATES

him surviving as his only heirs at law and next of kin Elizabeth Szeft, his widow, and Helen Szeft, a posthumous daughter, born February 27, 1925; that on August 12, 1934, Elizabeth Szeft was appointed administratrix of his estate; that after qualifying she, on December 3, 1925, resigned as such, and that on January 14, 1926, Lawrence Wisnowski was appointed administrator de bonis non of said estate and is now acting as such. The bill prayed that the three parties first above named be made defendants to the bill and that a foreclosure decree be entered, etc.

On September 4, 1926, Elizabeth Szeft and Wisnowski, as administrator, filed a joint and several answer. Their defense was that the note and trust deed were executed without any consideration. They alleged that the premises in question are now the homestead of Elizabeth and Helen Szeft, that complainant never in the lifetime of Maryan Szeft had demanded payment from him of any interest on the note, and that complainant frequently had admitted that no consideration for the note had been received by Maryan Szeft or by any person for him.

On March 4, 1927, a guardian ad litem was appointed for the infant defendant, Helen Szeft, and thereafter an answer was filed by the guardian, which answer contains substantially the same allegations and sets up the same defense as contained in that of the other two defendants.

After a reference of the cause had been made to a master to take proofs and report the same together with his conclusions, considerable evidence, oral and documentary, was introduced before him. From his report, filed October 15, 1927, it appears that defendants, to sustain the burden of their defense of want of consideration for the note, called as witnesses said Lawrence Wisnowski, whose wife

is the sister of Elizabeth Szeft, and said Elizabeth Szeft, the widow of Maryan Szeft, and they were examined and cross-examined at considerable length. In rebuttal complainant testified and he called as witnesses Helen Burkhardt, his daughter, Edmund Szeft, his son, and William Sippel, the notary public who had taken the acknowledgment of Maryan Szeft to the trust deed in question. In commenting upon the entire evidence the master stated in his report in substance that when Maryan Szeft executed the note and trust deed he was a bachelor and that he married Elizabeth Szeft in February, 1923; that the principal contention of defendants is that the note signed by him was without any consideration; that there is much testimony as to conversations had between complainant, Maryan, Elizabeth, and others, both before and after Maryan's marriage to Elizabeth, and as to admissions made by complainant to the effect that Maryan owned the premises in question and that they were free from any incumbrance; that the master found, however, that defendants' contention of no consideration was not sustained by the evidence, that complainant and his son, Maryan, were engaged in a co-partnership business with debits and credits between them, that complainant from time to time advanced to his son large sums of money, that the mortgage in question was not an isolated transaction, and that the note which it secured represented a stating of an account between them. After stating the amount due under the note, including solicitors' fees, the master recommended that a foreclosure decree for said amount be entered. The overruled objections filed to the report were ordered to stand as exceptions and after a full hearing before the chancellor the decree appealed from was entered.

No useful purpose will be served by a detailed discussion of the evidence. It is sufficient for us to say that, after

reviewing the same, we are of the opinion that the defendants did sustain the burden of their defense of want of consideration for the note and trust deed by a clear preponderance of the evidence, that the master was not warranted in his recommendation, and that the court was amply justified in decreeing that complainant's bill be dismissed for want of equity. There was no evidence that complainant advanced to his son large sums of money or that prior to the date of the note any account was stated between them. The solicitor for complainant, during the examination of the witness, Helen Burkhardt, who acted as complainant's bookkeeper and was the custodian of his books and accounts, promised to produce before the master evidence showing a stating of an account between complainant and his son, but never did so, and there was evidence showing that complainant procured the signing of the note and trust deed by the son, while the latter was in an intoxicated condition and did not know what he was doing. It is well settled that in equity a mortgage, given to secure a note which is without consideration, cannot be enforced. (41 Corpus Juris, p. 384, par. 196; Scott v. Magloughlin, 133 Ill. 33, 35; Schaenel v. Glade, 195 Ill. 62, 66).

The decree of the circuit court should be affirmed, and it is so ordered. As the printed abstract of the record, filed by complainant's solicitor, did not fully set forth pertinent testimony of some of the witnesses, defendants' solicitor properly filed an additional printed abstract. The cost of this additional abstract will be taxed against complainant.

AFFIRMED.

Seanlan and Barnes, JJ., concur.

250 I.A. 632⁵

32513

B. F. LINNENBERG et al.,
copartners, etc.,
Appellees,

v.

WILLIAM F. BOESER,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE HARRIS DELIVERED THE OPINION OF THE COURT.

This is an action by licensed real estate brokers to recover a commission alleged to be earned in their employment by defendant to procure a purchaser for certain pieces of real estate consisting of 131 acres "more or less."

The case went to a jury on the second and fourth counts of the declaration, the common counts, and plea of general issue supported by an affidavit of defense.

The principal difference in the special counts is that the second is predicated on an agreement to pay 5 per cent commission, and the fourth, to pay the usual and customary charges, etc. No proof of the latter being adduced the judgment rests on the second count or the common counts. The verdict and judgment were for \$11,500, approximately 5 per cent of the alleged agreed selling price of \$1800 an acre for about 133 acres.

The property in question was in three pieces described as containing 80, 40 and 11 acres, more or less, respectively. There is a conflict of testimony whether prior to signing and presenting the contract of purchase to defendant he disclosed that his father and not himself was the owner of the real estate in question. He claimed that he did so state and plaintiffs that he did not. To a special interrogatory, however, whether plaintiffs knew prior to

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1. RECEIVED 10/10/1964

1999, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 2681, 26

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1997 is again giving the economy a period of turbulent

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Source: Adapted from *Journal of the American Statistical Association*, 83(403), 1988, pp. 1039-1047.

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There is a strong relationship between the number of children and the number of children who are in the household.

Received 1991-10-25 and 11-12; accepted 1992-01-22.

all other things considered, the best way to deal with the

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Source: *U.S. Census Bureau, Bureau of Economic Analysis, "Gross Domestic Product by State, 1997-1999,"* <http://www.bea.com/states>.

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November 16, 1925, (when defendant made the written offer to plaintiffs hereinafter referred to) that defendant's father and not himself was the owner of said property, the jury answered "no", and we cannot say that the evidence does not justify such answer.

It is well settled law that if one makes a contract without disclosing his agency in the matter and purports to act upon his own personal responsibility, it is no defense to his personal liability that the title to the property involved was vested in another. (Swigart v. Hawley, 140 Ill. 186; H. O. Stone & Co. v. Deahl, 174 Ill. App. 421; Mudelman v. Haffenberg, 195 Ill. App. 91.) "If defendant did not see fit to guard himself against personal liability in not disclosing the fact of his agency he cannot be heard to complain of his own folly or lack of foresight." (Martin v. Ede, 103 Cal. 157.)

The alleged contract was partly oral and partly in writing, as, of course, could be. (Bueni v. Frechill, 125 Ill. App. 345, 348.)

While there was a conflict of evidence in other respects the jury may well have found therefrom that defendant orally submitted the property to plaintiff Wells on the terms of \$1500 an acre, one-third cash, balance on or before five years secured by purchase money mortgage bearing interest at 6 per cent, \$5000 to be deposited, 60 days allowed to close the deal, and defendant to pay 5 per cent commission on the purchase price; and that plaintiffs began negotiations with one Tutules who accepted the terms; and that before plaintiffs had an opportunity to communicate with defendant they received a letter from him under date of November 16, 1925, saying:

"Since my telephone conversation with you this afternoon, I have been offered \$1600 for our land in Du Page County, Ill., and in view of this fact want to withdraw my offer made to you this afternoon.

"If, however, you can sell said land at \$1800, I shall be glad to pay you a commission of 5 per cent.

Yours very truly,
William F. Hoeger."

It further appears that a few days later Tutules raised his offer to \$1600, and on December 1 accepted the terms aforesaid at \$1800 an acre and instructed Wells to draw the contract; that one was drawn and signed on a printed form uniformly used among real estate brokers in Chicago with which defendant was familiar; that he read it over and expressed satisfaction therewith, except that he wanted the first payment to be 24 per cent of the purchase price instead of one-third, on account of the income tax he would have to pay. Tutules assented to such modification, and defendant was to prepare a new contract. There was some delay and Tutules expressed anxiety to close the deal. Whereupon, on December 11, defendant presented a revised contract into which he injected terms variant from those originally submitted. One required annual payments, and that on the first payment the title should be put in trust in an individual trustee by the name of Weiss and not be conveyed by the trustee to the purchaser until the second ^{annual} payment was made.

The terms of sale originally submitted manifestly contemplated, in the absence of any provision to the contrary, that the title should go to the purchaser on closing the deal according to the submitted terms, and he was ready, able and willing to consummate it both on those terms, and as subsequently modified, and presented his check for the earnest money of \$5000. While the

"I have no objection to this
 this agreement, I have never before
 any kind of a large company, and in view of
 this I can see no objection to either of you
 this agreement.
 "I, however, you may wish to see it
 signed, I shall be glad to put a commission
 at a low rate."

Yours very truly,
 William A. Gordon.

It further appears that a few days later Gordon received
 his offer in writing, and he reported to Gordon the same afternoon
 of the day that he had received it. In view of the fact that
 one was then and there on a printed form, and the other was
 very much better in substance than the other, and the fact
 that he had it with him and signed it, and the fact that
 that he wanted the first payment to be in full of the balance
 price of the stock, he wanted to be paid for the stock
 have to pay. Gordon answered to him that he would not
 see in giving a new contract. They were then both
 exposed to each other in the same way. The same day
 Gordon presented a revised contract to him which he signed
 various from those originally submitted. The revised contract
 was, and that on the first payment the stock should be paid in
 full in an individual contract by the date of sale and not by
 conveyed by the transfer to the purchaser until the money was
 paid, and made.
 The terms of this contract were substantially the
 same as the terms of the contract of the company, and
 the same should be in the contract on the same day as the
 to the revised form, and he was ready, and willing to pay
 money in full at that time, and he subsequently withdrew, and
 presented his check for the amount of \$1000.00. After the

changes in the revised contract were deemed objectionable, yet Tutules expressed a willingness to waive them provided the title be held in trust by some disinterested bank instead of an individual trustee. But defendant would not accede to a change of the trustee and on that point of difference only the deal fell through.

Upon this state of facts, supported in our judgment by the weight of the evidence, we think the jury was warranted in the conclusion that plaintiffs furnished a purchaser on the terms originally submitted by defendant as modified by the letter of November 16, and as again subsequently modified as to the amount of the first payment, although the purchaser was not required to accept the latter modification to entitle plaintiffs to their commission.

A purchaser ready, able and willing to comply with the terms given by defendant having been furnished by plaintiffs before defendant sought a change of terms previously submitted, plaintiffs had then earned their commission regardless of the purchaser's willingness to acquiesce in subsequent changes. Defendant cannot because of the refusal of the purchaser to accede to entirely new terms evade the responsibility for liability to plaintiffs under the oral terms of the agreement as modified by the letter of November 16, upon which plaintiffs were authorized to procure, and did procure, a purchaser ready, able and willing to comply with them.

We cannot agree with appellants' counsel that there was any departure in the proof from this theory of the action, or that the action is not sustained by the evidence.

Defendant's frequent shifting from the terms on which he

authorized plaintiff to find a purchaser, indicated bad faith and a desire to breach the contract, and the somewhat captious grounds upon which a reversal of the judgment is sought serve to strengthen that conclusion.

Defendant did not furnish plaintiffs with a legal description of the property for sale. Plaintiffs, however, knew its locality and the approximate number of acres, and viewed it with Tutules. Two pieces contained about 118 acres, one situate in and conforming to the north half (N.½) of southeast quarter (S.E.¼) of section twenty-six (26), and the other in and conforming to the southwest quarter (S.W. ¼) of section twenty-three (23), township thirty-nine (39) north, range eleven (11) east of the third principal Meridian in DuPage county, Illinois. A third piece contained 11 acres adjoining that was partly in the southeast quarter (S.E.¼) of section twenty-six (26). The pieces were so described in the contract drawn by Wells. As testified to by defendant the tracts so adjoining were in one piece and contained 128.40 acres.

The deed of the same to defendant's father was by metes and bounds which appear to conform closely to the government survey. The description by metes and bounds was used in the revised contract. No discussion or difference arose over the description in either contract, nor as to the particular tracts the parties mutually had in mind in their negotiations. Both parties recognized that the writings undertook to describe these particular tracts. Because, as claimed by defendant, the two descriptions did not embrace precisely the same land it is urged that the minds of the parties did not meet as to the subject matter of the contract. The contention is captious. Tutules did not insist on acceptance of the contract he had signed nor object to taking title according to

the description of the property in the contract drawn by defendant. Both parties understood what land was contemplated in the negotiations, and Tutules was willing to accept all the terms contained in the revised contract though variant from those submitted, even those for a trustee, but dissented only as to the trustee named. Neither the precise quantity nor precise description of the property contemplated to be sold by defendant and to be purchased by Tutules figured in terminating the negotiations and neither has any bearing on the question of plaintiffs' right to a commission.

We find no reversible error in the rulings upon evidence or the instructions.

The judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

The description of the property in the contract drawn by defendant.

Both parties understood that land was contemplated in the

negotiations, and defendant was willing to accept all the terms

contained in the revised contract, though plaintiff knew that the

title, even then for a fraction, was defective only as to the

fractional amount. Neither the parties nor the parties' attorneys

described the property as contemplated in the contract by defendant

and it is not shown by the evidence that defendant intended to acquire the property

and neither has any action on the contract of plaintiff's right

to a commission.

It is not possible to see in the contract any violation

of the contract.

The judgment is affirmed.

ATTORNEYS

Griffey, L. L., and Loring, L. L., counsel.

32525

250 I.A. 633

ANNA FENCŁ,
Appellant.

v.

JOSEPH KORCZEWSKI,
WANDA KORCZEWSKI, MARTIN
BYCZEK and AGATA BYCZEK,
Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from the dismissal for want of equity of a bill to foreclose a trust deed securing a principal note of \$4000 and certain interest coupons. The chancellor sustained the exceptions to the report of the master in chancery to whom the cause was referred for his conclusions of law and fact.

The report of the master discloses no dispute of material facts.

The trust deed and the promissory note of \$4000 it secures were executed November 4, 1918, by Joseph Korczewski and Wanda Korczewski, his wife. The note and coupons were payable to their order three years after date, with interest, and were endorsed by them in blank. The deed conveyed the premises to Bruno F. Kowalewski as trustee. It contained the usual covenants and was duly recorded. On the maturity of the note November 4, 1921, the Korczewskis signed an agreement extending it for a period of three years and coupon notes covering that period. At the end of the period of extension it was again extended for another period of three years by their signing another extension agreement and other coupon notes. Default was made in the payment of the interest coupon notes maturing May 4, 1925, and November 4, 1925, and subsequent dates.

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1. The first of these is the fact that the
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re view of the above information, complete it with one of the following:

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U.S. DEPARTMENT OF AGRICULTURE

... ..

On the subject of the case known as "The Case of the Missing Ship," the following information was obtained from the Bureau of the Navy:

Source: U.S. Census Bureau, *U.S. Census of Population, 1980*, vol. 1, PC80-1, Washington, D.C., 1981, table 1-1.

recovered by Salinas will be one of \$1.1 million, plus interest, notes

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2. The following information is for your information only:

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... ..

January, 1920, the Korczewakis conveyed the premises in question by warranty deed to said Bruno F. Kowalewski, subject to the trust deed in question and another encumbrance not here involved. In April, 1920, said Kowalewski agreed to sell the premises to defendant Martin Byczek subject to the latter encumbrance only. The deal was consummated in May, 1920, at the office of Kowalewski Brothers, 1259 West 51st street, Chicago, where the note and coupons in question were payable, and upon information by said Bruno F. Kowalewski, one of said brothers who did a real estate and banking business at said office, Martin Byczek paid him \$4000, supposing he was paying off the mortgage or trust deed in question. Kowalewski at the time was president of the Sherman Park State Bank, conducted from said premises. He made what was evidently a pretended search for the note and mortgage in his desk and said "I can't find them, but as soon as I find them I will give them to you." The Byczeks closed the deal, relying upon such promise, and never received a release of the trust deed or a cancellation of the notes secured thereby, and appear to have taken no steps to secure said papers thereafter or to have inquired about the same. In May, 1925, Kowalewski committed suicide after which various acts of defalcation and embezzlement by him were said to have been revealed. He appears to have induced the Korczewakis to make the several extensions referred to, they evidently supposing he owned the note. There was no proof whatever as to who was the owner thereof at the time of its delivery, or at any time thereafter before it was produced at the trial by complainants. It bears no other endorsement than that of the makers. Probably on the suggestion of the death of Anton Fencel, mentioned in the briefs, but not made to appear in the clerk's record, Anna Fencel became the surviving complainant and is referred to as sole complainant in the decree.

[illegible]

The decree recites that the exceptions of Martin Byczek and Agata Byczek to the master's report were sustained, "and thereupon the court stated its desire and willingness to re-refer said cause to the master in chancery for the purpose of permitting complainants to make proof of the date they acquired the notes and trust deed herein, which said offer was then and there declined on the ground as stated that he (she) was unable to make such proof, which statement was challenged and denied by solicitor for defendant and the complainants elected to stand upon the report of the master in chancery." And the decree proceeds to recite that complainants failed to prove the material allegations contained in their bill of complaint, finds the equities for defendants and directs the dismissal of the bill for want of equity.

At the hearing before the master complainants produced the principal note and unpaid coupons, the trust deed and the extension agreements in question, execution of said agreements being admitted by defendants, and rested their case upon such proof. That such proof made a prima facie case for complainants and cast on defendants the burden of proving a defense thereto is not open to question. (Boudinot v. Winter, 190 Ill. 394.) But no attempt whatever was made to dispute complainants' right of possession and bona fide ownership of the note and coupons. No relief was sought or recommended against the Korczewskis. Only the Byczeks filed exceptions to the master's report. The only defense they undertook to make was that the note had been paid by them to Kowalewski as complainants' financial agent. There was no proof to support such claim of agency, or that at the time of such payment Kowalewski, or even the bank of which he was president, had possession of or owned the note in question, or that either was acting as the agent for complainants. On the contrary, the Byczeks were clearly guilty of neglect in making such payment without requiring cancellation

of the note and release of the trust deed. They trusted Kowalewski to obtain the same for them and thereby made him their agent and must accept the consequences of their own neglect. Nor was there any proof offered of fraud in the procurement of such extensions. There was, therefore, no proof of either of the defenses relied upon to defeat the foreclosure.

It is not questioned that the assignment of the note carried the security with it, or that by the endorsement of the note in blank it passed by mere delivery.

It is also a settled principle of law in this state that the bona fide assignee of notes secured by trust deed thereby acquires the security, subject, only, to the equities of the mortgagor and not subject to latent equities of other parties of which he has no notice. The law on this subject has been laid down in a long line of decisions cited on this question in Bann v. Merchants' Loan & Trust Co., 100 Ill. App. 224, where the court also said: "Possession of a negotiable note indorsed in blank is prima facie evidence of title, and the holder of such instrument is presumed to have taken it in good faith, for value, before maturity, in the usual course of business and without notice."

From this state of the record and the recital aforesaid in the decree we cannot but be impressed that the court dismissed the bill for want of equity solely because the surviving complainant declined the unsolicited offer of the court to re-refer the cause to permit her to make proof of the date when complainants acquired the notes and trust deed. She was not required to accept such offer. She had a right to stand on her un rebutted prima facie case and the master's report, and the chancellor had no other alternative than to

of the note and release of the bond. They require knowledge to obtain the same for use and thereby make the bond agent and must accept the consequences of their own actions. There was their own proof offered of fraud in the procurement of such releases. There was, therefore, no proof of fraud at the time the release was given.

defect the release.

It is not sufficient that the instrument of the note be void. The necessity of the law of the instrument of the note is also required by the law of the instrument.

It is also a matter of fact that in this case the bond was given at a time when the law of the instrument was not subject to the law of the instrument. The law of the instrument was not subject to the law of the instrument. The law of the instrument was not subject to the law of the instrument.

There is no question as to the fact that the law of the instrument was not subject to the law of the instrument. The law of the instrument was not subject to the law of the instrument. The law of the instrument was not subject to the law of the instrument.

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The law of the instrument was not subject to the law of the instrument. The law of the instrument was not subject to the law of the instrument. The law of the instrument was not subject to the law of the instrument.

render a decree upon such record in favor of the surviving complainant. Had defendants entertained any doubt of the bona fides of complainants' ownership of the note there was nothing to prevent their calling complainants or others to testify upon the subject when the case was before the master. They not only did not avail themselves of that right but raised no question in regard thereto before him, and made no motion and presented no grounds for a re-reference. A mere suspicion or challenge by defendants' counsel of complainants' ability to confirm their prima facie case by further proof afforded no valid ground for the court's action in dismissing the bill.

Complainants having made out a clear prima facie case that was not rebutted, and no evidence having been introduced to sustain the defense of Kowalewski's agency for complainants in receiving payment of the mortgage by Byczek, or of fraud in the extension of the notes, it was the duty of the court, under the issues raised and evidence offered, to confirm the master's report and enter a decree in accordance with his recommendation.

Accordingly the decree will be reversed with directions to overrule the exceptions to the master's report, to approve the report and to enter a decree in accordance with its recommendations.

REVERSED WITH DIRECTIONS.

Gridley, P. J., and Scanlan, J., concur.

During a recent year there was a large increase in the number of complaints received by the Board of Health. The increase was due to the fact that the Board of Health had been organized and the public had been educated to the fact that the Board of Health was the proper authority to which to apply for relief. The Board of Health had been organized and the public had been educated to the fact that the Board of Health was the proper authority to which to apply for relief. The Board of Health had been organized and the public had been educated to the fact that the Board of Health was the proper authority to which to apply for relief.

Complaints being made and a plan being made to deal with them. The plan was to have a committee of the Board of Health to investigate the complaints and to report to the Board of Health. The committee was organized and the public was educated to the fact that the Board of Health was the proper authority to which to apply for relief. The Board of Health had been organized and the public had been educated to the fact that the Board of Health was the proper authority to which to apply for relief.

Accordingly the Board of Health was organized and the public was educated to the fact that the Board of Health was the proper authority to which to apply for relief. The Board of Health had been organized and the public had been educated to the fact that the Board of Health was the proper authority to which to apply for relief. The Board of Health had been organized and the public had been educated to the fact that the Board of Health was the proper authority to which to apply for relief.

During the year 1900, the Board of Health received 1,000 complaints. The increase was due to the fact that the Board of Health had been organized and the public had been educated to the fact that the Board of Health was the proper authority to which to apply for relief. The Board of Health had been organized and the public had been educated to the fact that the Board of Health was the proper authority to which to apply for relief.

32539

250 I.A. 633²

J. R. CLOGG & CO., Ltd.,
Appellant,

v.

JAMES L. SLATTERY,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

In its statement of claim plaintiff alleged that on November 8, 1922, it advanced \$2000 to defendant pursuant to an arrangement between them whereby defendant was to make deliveries of certain fruits from time to time in the year 1923, from South America to plaintiff's place of business in Montreal, that he has failed and refused to make them, and that he has often promised to return the money but has failed to do so.

In defendant's affidavit of merits he admits receiving the money, denies that it was advanced pursuant to any such agreement, and alleges in effect that plaintiff contributed said sum, and that others also contributed large sums, towards expenses of a speculative enterprise whereby he was to go to South America to investigate the possibilities of sending fruit to this country and Canada when fruits were out of season, and if possible, enter into contracts with the growers in South America to ship the same to plaintiff and others participating in the enterprise; that the funds he received were exhausted in an unsuccessful promotion of the enterprise, and that he never promised to return the money nor breached his agreement.

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2501

J. A. [illegible] & Co., Ltd.,
[illegible]

[illegible]

[illegible]

JAMES H. [illegible]

[illegible]

MR. JUSTICE [illegible] THE COURT IN THE [illegible]

In its statement of claim plaintiff alleged that on

November 8, 1921, it assigned [illegible] to defendant pursuant to an

assignment between them whereby defendant was to have possession

of certain [illegible] from time to time in the year 1921, from [illegible]

and to plaintiff's [illegible] of business in [illegible]. And on

the [illegible] and [illegible] to make [illegible] and [illegible] to pay [illegible]

plaintiff is to [illegible] the money and [illegible] to be [illegible]

In its statement of claim plaintiff alleged that [illegible]

the money, [illegible] that it was assigned pursuant to the [illegible]

money, and [illegible] is alleged that plaintiff [illegible] with [illegible]

and that [illegible] also [illegible] [illegible] [illegible] [illegible] [illegible]

investigative [illegible] [illegible] [illegible] [illegible] [illegible]

investigate the [illegible] of [illegible] [illegible] in this [illegible] and

Canada [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

contacts with [illegible] [illegible] [illegible] [illegible] [illegible]

plaintiff and [illegible] [illegible] in the [illegible] and the [illegible]

he [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

anticipated, and that he never [illegible] [illegible] the money and

obtained his [illegible]

It is noticeable that the affidavit of merits does not claim agency, or a partnership, or a contract for a stated compensation or commission. It may not matter, but just how defendant was to profit by the "speculation" is not apparent from either his pleading or his evidence.

Plaintiff's evidence was in the form of a deposition of its manager, one Foley, to which was attached correspondence between the parties. Defendant was his only witness as to the arrangement.

Foley deposed that he made the agreement with defendant for plaintiff, and advanced him \$2000 as a loan to go to Ecuador to purchase fruits and quote prices therefor to plaintiff below the New York city prices; that defendant "made it clear that he was acting for himself and not as agent for plaintiff or other firms," and that he thought the loan would be repaid after two or three shipments, and that if the deal failed he would repay the loan on his return from South America.

Plaintiff's check for said \$2,000 was enclosed in a letter of November 8, 1922, addressed to the firm of Slattery Bros. - with which defendant was connected - stating that Mr. Clegg had agreed to send the check "to be deducted at finish of the season."

Defendant acknowledged receipt of the check by letter of November 11, as "advance on S. A. deal," and in his letter to plaintiff of November 13 tells of his arrangements with a New York firm "to look after shipments on arrival" there. While on ship November 26 he writes of prospects for reduced prices.

Defendant was unsuccessful in his undertaking and

returned to Chicago to negotiate for additional finances. In response to plaintiff's letter of January 16, 1924, stating an understanding of the agreement in harmony with Foley's testimony, and asking in consequence of getting no shipments that it be given a note for \$2000 which it might use as collateral, defendant on January 19, 1924, replied by letter that the delay in shipping was regretted and negotiations were pending for additional finances, and said "your advances can be taken care of in this way at an early date." In reply to another letter of plaintiff under date of March 21, 1924, saying it "would like to have the return of our \$2000 as soon as possible," defendant in a letter five days later said: "I am using every endeavor to enable me to satisfy the obligation at an early date."

In his testimony defendant Blattery says the project was in reference to shipping fruits in South America in off seasons; that the interested parties being unable to offer further financing he told Foley "it would be necessary for him to get an advance" for expenses to get to South America and "carry on things while there," and that any money advanced would not be taken out of the initial shipments but at the end of the season. No shipments were made.

We cannot read this evidence without concluding that the verdict for defendant was against the manifest weight of the evidence. Defendant's own letters and testimony recognize that there was no partnership or agency relation between him and plaintiff, and whatever way he was to profit by the enterprise by which he was to secure shipments of fruits from South America to plaintiff and others at reduced prices from what they had been getting them, he recognised an obligation to return the money whether advanced or loaned.

While the nature of the contract by which he became so obligated is not made clear by the evidence adduced there was sufficient evidence to disclose the admission of an obligation and a promise to return the money.

Because the verdict on which the judgment rests was clearly against the weight of the evidence the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Seanlan, J., concur.

While the nature of the contract is also to be
so situated as not to be in the interest of the
and sufficient evidence is shown the intention of an
obligation and a promise to return the money.
Between the parties on which the judgment rests
clearly against the weight of the evidence the judgment is
reversed and the cause remanded.

REVEREND THE COURT,

October 7, 1911, at New York, N.Y.

32594

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

GUST STAVRAKAS and PETER
VOULGARIS,

Plaintiffs in Error.

250 I.A. 633³

ERROR TO CRIMINAL COURT,

COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error were indicted for a conspiracy to deface a certain described building owned by Samuel Levine, and certain fixtures therein described as a glass window.

A review of the judgment of conviction is sought by this writ.

The evidence disclosed that a store on the first floor of the building in question was on October 29 and 30, 1927, and prior thereto, occupied by the prosecuting witnesses James Kryiakoples and his son Socrates, who were members of a labor union, as tenants of said Levine, and that they conducted there a hat cleaning and shoe-shining business. On the morning of October 29 when Socrates opened up the store for business he saw that the large front glass window was shattered. The glass was replaced during the day and Socrates remained on watch near the window on the inside of the store, during the night. About three o'clock in the morning of the 30th he saw a car drive up to the curb and a man get out of it and hurl a brick against the window glass, shattering it as before. He recognized defendant Voulgaris as that man, and defendant Stavrakas as the driver of the car, with both of whom he was well acquainted and had been

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for several years. Both of them were in the same line of business as himself and belonged to a rival labor union of which Stavrakas was president and Voulgaris business agent. They had attempted to collect dues for their union from the prosecuting witnesses, who belonged to a different union, and who claimed they were threatened by defendants when they refused to pay the same.

It is urged the evidence is insufficient to sustain a conviction. While defendants denied having any part in the act of shattering the window and set up an alibi the jury evidently did not believe their testimony or that tending to show an alibi, but accepted the evidence presented by the prosecution tending to establish their identification as participants in the act, and to show as a motive therefor previous threats toward the prosecuting witnesses if they refused to recognize the union of which defendants were officers. It seems to be a case of the credibility of the witnesses, whom the jury saw and heard, and we cannot say that the jury were not justified in believing the testimony of the prosecution and not that of defendants. If they were the testimony of the prosecuting witnesses was sufficient to establish guilt beyond a reasonable doubt.

It is contended that there was not sufficient proof of Levine's ownership of the premises. In the absence of any affirmative proof to the contrary, or any attempt to produce the same, we think the testimony of Socrates that he rented the premises from Levine; that the latter is the owner of the building; that he is a tenant there and was "such tenant" during the month of October, 1927, including October 30, constituted prima facie proof of Levine's ownership at the time of the overt act testified to.

for several years. With it there was in the same line of business
as himself and belonged to a rival firm of which he was
was president and vice-president. They had extensive
to collect from the same firm the same amount of money,
who belonged to a different firm, and who also had their
interested by collecting when they refused to pay the same.
It is alleged the witness is identified as having a
connection. This defendant denied having any part in the act
of collecting the money and set up as his only witness
his own belief that defendant was that working as some one else,
but accepted the witness presented by the prosecution working in
defendant's identification as defendant in the act, and to
show as a motive thereon previous witness denied the prosecution
allegation it was refused to recognize the action of which defendant
made some attempt. It seems to be a case of the possibility of
the witness, whom the jury saw and heard, and as cannot say that
the jury was not justified in believing the testimony of the
prosecution and not that of defendant. It was with the testimony
of the prosecution witness and defendant as defendant's right
beyond a reasonable doubt.

It is contended that there was not sufficient proof of
Levine's ownership of the business. In the absence of any
affirmative proof to the contrary, it was alleged to prove the
same, no other testimony of defendant that he owned the
business from which the money was taken in the money at the witness
that he is a Jewish man and was "well known" during the month
of October, 1917, including defendant's connection with
proof of Levine's ownership at the time of the crime and location

As to the contention that the window glass is not a fixture, it is enough to say that the shattering of it constituted a defacement of the building, and proof of that fact was sufficient without proof that a window glass is ^a fixture.

After reviewing the rulings of the court on instructions given and refused we think there was no reversible error and that the jury on the whole was properly instructed.

Nor is there any just ground for criticism of the court's rulings on evidence or of its efforts to keep defendants' counsel within the limits of proper procedure.

The contention that the judgment order violates section 2 of the Parole Law in that it requires defendants to work out in the House of Correction the fine and costs imposed by the judgment if not paid at the expiration of the penitentiary sentence, has no basis in fact as the House of Correction is not a state institution and therefore not within the inhibition of said section.

The points made and argued for reversal are highly technical and captious.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

as to the contention that the single class is not a
 distinct, it is enough to say that the character of it is
 a determination of the building, and proof of that fact was
 without proof that a class was in ^a existence.
 After reviewing the findings of the court on this point
 given and refused to think there was no reversal error was made
 the jury on the claim was properly instructed.
 But in these two cases, the evidence of the court's
 findings on evidence as to the effect of the defendant's conduct
 within the limits of proper procedure.
 The contention that the defendant's conduct was
 of the facts now in fact is required otherwise he will not in the
 house of construction and time and costs imposed by the judgment is
 not held as the expiration of the period of construction, and so
 basis in fact as the house of construction is not a class construction
 and therefore not within the limitation of said statute.
 The points made and shown for reversal are hereby
 submitted and explained.

GRACEY, J., and WHEELER, J., concur.

32611

ETHEL CROBIN,
Plaintiff in Error,

vs.

FRANK CROBIN,
Defendant in Error.

250 I.A. 633⁴

ORDER TO SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The order under review is one modifying the provision in a decree of divorce with reference to the visitation of the children by the parents, and holding defendant not guilty of contempt. Alleged errors in the contempt proceeding were waived on the oral argument.

A decree of divorce to complainant entered herein December 31, 1924, gives the mother the custody of one child, the youngest, and the father the custody of three of the children of the marriage, with certain mutual rights of visitation.

On May 9, 1925, defendant filed a petition for modification of the provision as to visitation. No definite action was taken thereon before December 30, 1925, when complainant asked for a rule on defendant to show cause why he should not be attached for failure to comply with the provision respecting such visitation. On the same day defendant filed an affidavit accusing plaintiff of acts of immorality and asking that they be investigated.

The order under review, entered February 26, 1926, recites the filing of such papers and that a hearing was continued to January 11, 1926, for an investigation of defendant's accusations and charges "by the Social Service Bureau of Cook County to check the authenticity of said charges," and the court finds from reports submitted to the court by such Social Service

Bureau (which the order recites are attached to and made a part thereof) that the defendant has given a good home and care to the children in his custody, that complainant is unfit to have communication with them, that she has forfeited all right to visit and communicate with them, and that the charges against her are verified by such reports, and then orders that the decree of divorce be so modified as to deny and enjoin complainant the right of visitation of the children in defendant's custody until further order of the court.

The procedure in the matters thus brought before the court was exceedingly irregular. The petition for modification of the decree was not sworn to, nor was complainant required to answer the same. Whether defendant's affidavit of December 30, 1925, was intended as an answer to the rule for his attachment or to supplement his petition for modification of the decree is not determinable from the record. The court, however, seems to have proceeded without any regard to chancery practice which governs such proceedings and to have acted and based its order entirely upon extra-judicial reports instead of facts or sworn evidence. It does not appear that any evidence was heard other than the affidavit for attachment and defendant's "affidavit" of December 30, 1925. The court's finding that complainant is never to have any further communication with the children in the custody of defendant is based wholly on said reports which merely purport to give interviews of some members or investigators of the Social Service Bureau with some of the children and other parties, and is not based on sworn statements or affidavits as to facts. Said reports possess none of the characteristics of legal evidence and were erroneously treated as such. Consisting, as they do, of merely unsworn ex parte statements the order cannot stand upon them. (40 Cyc. 2410; 28 R. C. L. 584, 585.) Nor are any specific facts

anyone (with the other parties who attended in such a way as to
 thereof) that the defendant has given a good name and does so (the
 obligation in his country, and commitment in such a way as to
 action also then, that the law forbids all times to itself and
 communicate with them, and that the defendant should not be
 tried by such persons, and then advise that the person of
 be so notified as to deny and obtain commitment, the right of
 violation of the obligation in defendant's country until further
 order of the court.

The procedure in the matter was decided before the
 court was exceptionally interested. The position of defendant
 of the facts was not such as, but was committed to the
 matter the same, because defendant's obligation of December 10,
 1902, was intended as an answer to the bill for the defendant
 or to suspend his obligation for satisfaction of the facts in
 not defendant's law was intended. The court, however, seems to
 have proceeded almost any regard to defendant's position with
 Governor such proceedings and to have acted and acted in such
 entirely upon other-fact-based reports instead of 1. as to
 evidence. It was not enough that my witness was heard under
 from the witness's law statement and defendant's "affidavit" of
 December 10, 1902. The court's finding that defendant is under
 to have my friend communicated with the witness in the country
 of defendant is based upon an oral report which merely repeats
 to give information to some member of the committee as the basis
 before the court with none of the obligation and other evidence, and
 is not based on more than the affidavit of the witness. This
 reports because none of the communication of legal evidence and
 were actually known to some. Defendant, on July 21, 01,
 merely reported on July the same as the other cases and then
 (the other side; on 21, 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 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to support the court's conclusion found in the order or preserved by a certificate of evidence.

The order will be reversed so far as it modifies the decree, without prejudice, however, to proper procedure on a proper sworn petition and a rule to answer the same, and it will be affirmed so far as it holds defendant not guilty of contempt.

REVERSED IN PART AND AFFIRMED IN PART
AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

to answer the state's question found in the state of Tennessee
by a majority of six.

The state will be covered on the 11th of the month.

There, without exception, however, is every opportunity to
know more about the state and its people, and it will
be difficult to find as in other states and being at night.
Therefore in this the answer is that

THE ANSWER

THE ANSWER, THE ANSWER, THE ANSWER.

32630

250 I.A. 634

ALBERT A. SUTTON,
Plaintiff in Error,

v.

RAILWAY MAIL ASSOCIATION,
a corporation,
Defendant in Error.

ERROR TO SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action for libel in which there was a directed verdict for defendant at the close of all the evidence.

There is much unnecessary discussion in the briefs for determination of the assigned errors relied upon, which involve whether an instructed verdict was justified.

The alleged libelous article appeared in the official publication of defendant, in which the author, who like plaintiff was a member of defendant association, after a series of controversial articles between him and plaintiff previously published in the same paper, showing mutual bitterness and vindictiveness, imputed to plaintiff dishonesty, cowardice, egotism, as having the least charm where best known, of being an enemy of the association and sowing the seeds of dissension and being a trouble maker therein, and other characteristics which had a tendency to bring him into ridicule and estrange him from his former associates and friends, and which were treated by the pleadings and course of procedure as libelous per se. The article was unquestionably libelous, and it is too voluminous to be set forth at length here. Nor is it necessary.

2501A, 684

2501A, 684

THOMAS W. BOWEN, JR.
YOUR OFFICE.

ALBERT A. BOWEN,
1111 1st Street,
N. Y.
BOWEN BROS. MANUFACTURING
A CORPORATION,
BOSTON, MASS.

MR. BOWEN BROS. MANUFACTURING, THE OFFICE OF THE COURT.

This is to certify that I have been a
directed verified the statement of the above of all the evidence.
There is much unnecessary statement in the above
The determination of the evidence above stated, which
involve whether an individual verified was verified.

The alleged libelous article appeared in the official

publication of defendant, in which the author, who like defendant

was a member of defendant's association, after a review of the

prosecutor's evidence between him and defendant previously published

in the same paper, showing actual dishonesty and misstatements,

imputed to plaintiff's character, reputation, standing, as having

the facts shown above were known, or being on inquiry of the

association and agent, the agent of defendant was being a libelous

work libelous, and other statements which had a tendency to

bring him into ridicule and contempt and from his former associates

and friends, and which were directed by the plaintiff and known to

prosecutor as libelous. THE The article was untruthfully

libelous, and it is the defendant's duty to set forth its facts.

Not in its possession.

Defendant filed the plea of general issue together with notice of special matter of defense, alleging that certain charges in said article were true, and evidence of justification was introduced. That in such a case the court cannot direct a verdict was said in Gault v. Babbitt, 1 Ill. App. 136, to be too elementary to require citation of authorities.

The article being libelous per se it was not necessary to allege or prove special damages. (White v. Borquin, 204 Ill. App. 83.) It was not privileged in character, and the question of malice was for the jury. [Flynn v. Boglarsky, 164 Mich. 513; Tanner v. Stevenson, 138 Ky. 578; Childers v. Mercury P. & P. Co., 105 Cal. 284, 289.)

REVERSED AND REMANDED.

Gridley and Scanlan, JJ., concur.

Following listed the list of general laws together with notice of special order of defense, including that which changed in said article with time, and evidence of justification was introduced. There is much a case the court cannot discuss a verdict was held in United v. Roberts, 111. App. 191. to be now elementary as relative relation of collection.

The article being discussed here is not necessary to discuss or prove special damages. United v. Roberts, 111. App. 88. It was not introduced in evidence, and the question of malice was for the jury. United v. Roberts, 111. App. 191. United v. Roberts, 111. App. 191. United v. Roberts, 111. App. 191.

111. App. 191.

UNITED V. ROBERTS

United v. Roberts, 111. App. 191.

32641

ILLINOIS MERCHANTS TRUST COMPANY,
as surviving trustee, etc.,
Appellant,

v.

CHRIST NICOLAIDES,
Appellee.

250 I.A. 684²

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a forcible detainer suit, in which there was a finding and judgment for defendant. This appeal followed.

The premises consist of a room or store known as 600½ Blue Island avenue, which had been partitioned off from a room known as 600 Blue Island avenue, and was occupied by defendant as a fruit store under a verbal agreement with an agent for plaintiff for a tenancy from month to month. The title to the building containing both rooms was vested in plaintiff as trustee of an estate.

The notice to terminate such tenancy was given in plaintiff's legal corporate name, "Illinois Merchants Trust Company." Because there was not appended thereto the descriptive words "as surviving trustee" etc., as appear in the title, the trial court held it was insufficient. The ruling was incorrect. In a court of law trustees are unknown and have no standing as such. (Wahl v. Schmidt, 307 Ill. 331; Duvall v. Craig, 2 Wheaton 44, 56.) The words in the title of the action were descriptio personae, unnecessary and surplusage and would have been equally so in the notice. (Wahl v. Schmidt, supra; Taylor v. Davis, 110 U. S. 330.) Being in writing and otherwise in

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ADVISORY BOARD

UNITED STATES

RECEIVED
ADVISORY BOARD
UNITED STATES

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UNITED STATES
ADVISORY BOARD

MR. JONAS BAKER, DIRECTOR OF THE BOARD.

This is a verbatim transcript of the hearing held on January 10, 1941, at the Federal Bureau of Investigation, Washington, D. C., in connection with the hearing of the case of the above-named individual. The transcript was prepared by the stenographer present at the hearing, and was reviewed by the stenographer and the Director of the Federal Bureau of Investigation. The transcript is being submitted to you for your information and for the purpose of being placed in the files of the Federal Bureau of Investigation.

The hearing was held on January 10, 1941, at the Federal Bureau of Investigation, Washington, D. C., in connection with the hearing of the case of the above-named individual. The transcript was prepared by the stenographer present at the hearing, and was reviewed by the stenographer and the Director of the Federal Bureau of Investigation. The transcript is being submitted to you for your information and for the purpose of being placed in the files of the Federal Bureau of Investigation.

unquestioned form the notice was in compliance with the statute.
(Sec. 6, ch. 30, R. S.)

But appellee urges that one Gerakaris was the only person entitled to demand possession. The notice was dated and served September 30, 1927, and required surrender of the premises at 600½ Blue Island avenue on October 31 following. September 30, 1927, before signing such notice in the name of plaintiff by himself, as authorized to do, the agent, without authorization, undertook to execute a lease from plaintiff to said Gerakaris of both of said rooms (600 and 600½ Blue Island avenue) for a term of ten years from October 1, 1927. Not being authorized in writing to execute such instrument it was void under section 2 of the Statute of Frauds (section 2, ch. 59 R. S.) and hence gave Gerakaris no right to the premises. He took possession of 600, but not of 600½ held adversely by defendant. Such right as he had was limited to mere occupation of 600 until notified to surrender the same. (16 R. C. L. 574, section 49; 36 C. J. 620.) While he surrendered such possession it is enough to say that neither the lease nor occupancy of the part of the premises known as 600 gave him constructive possession of the part occupied by defendant, or any right thereto, or changed the existing tenancy between plaintiff and defendant.

The evidence sustained the cause of action and accordingly the finding and judgment below must be reversed with a finding of facts, on which judgment for possession will be entered here.

REVERSED WITH FINDING OF FACTS
AND JUDGMENT HERE.

Gridley, P. J., and Scanlan, J., concur.

unpublished from the nation was in connection with the nation.

(See, e. g., 20, 21, 22.)

But questions arise that are inevitable and the only

persons entitled to answer questions. The nation was asked and

answered questions 24, 25, 26, and received answers of the following

at that time which concern the nation in following. Questions

27, 28, 29, before asking such nation in the form of questions

themselves, as indicated in 24, the agent, without explanation,

understood as answers a letter from himself to the nation

of both of said letters (200 and 201) from the nation for a

form of ten years from nation 1, 1977. Not being understood in

writing to answer such questions it was said what nation 2

of the nation of friends (nation 1, 20, 21, 22) and nation gave

answers in reply to the questions. The book presented at that

but not at 2000 held answers to questions. When asked as he had

was limited to only questions of 2000 which nation 1 answered

the nation. (See 20, 21, 22, nation 1; 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 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FINDING OF FACTS.

We find that on and prior to September 30, 1927, and up to the trial of this suit, defendant was in possession of the premises in question as a tenant of plaintiff from month to month, and that he was served with a thirty day notice on said date in writing, duly signed by plaintiff, to terminate such tenancy, and that he has continued to detain the premises from plaintiff.

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WALTER GASSCAW,
Appellee,

v.

WESTERN UNION TELEGRAPH
COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action in tort to recover damages for failure to deliver to appellee a telegram given to appellant at Brooklyn, N. Y., May 16, 1925, by appellee's wife, addressed to "Walgass, Chicago, Illinois," and reading: "Arrived safe. Stopping at Ginsberg, Sadie." On a trial without a jury the court assessed damages and gave judgment for \$84.80 and costs. This appeal followed.

It appears that Mrs. Gasscaw on arrival in New York by ocean steamship sent the message, addressing it in the name used for her husband's cable address. Defendant wired back to its Brooklyn office for a better address. The sender of the message gave it as 5535½ Winthrop avenue, Chicago. On receiving this address the message was forwarded to defendant's Broadway office, Chicago, for delivery at that street number. A messenger was sent there who reported that the party had moved from that address and this fact was wired back by appellant to its Brooklyn office. All this took place Saturday, May 16, 1925. Upon the information evidently received in this exchange of telegrams defendant on Monday, the 18th, mailed a notice of the receipt of the telegram to plaintiff addressed in his correct name to the street number to which he had moved. For some reason plaintiff did not receive

the notice until the following Thursday when he called and got the message. In the meantime he sought the whereabouts of his wife and went to expense in ascertaining the same, which he seeks to recover in this action.

But regardless of the character of the expense he includes as damages, and regardless of the question of fact whether there was any negligence on the part of defendant, questions we need not discuss, under the authorities the character of the message is such that delay in delivering the same would not render defendant liable for damages beyond the charge for transmission, which, however, it does not appear plaintiff paid. It seems to be the uniform ruling of the courts on this subject that if a telegram does not show upon its face that it relates to a commercial transaction damages suffered in connection with the same or as a result of its non-delivery cannot be recovered. The principle upon which the ruling is founded is that damages for a breach of contract are limited to such as may reasonably be supposed to have been in contemplation of both parties at the time the contract was made, as a probable result of the breach of it. The well known rule on this subject was laid down in Hadley v. Baxendale, 9 Exch. 341, and has been generally followed in this country as well as in England. We followed the rule in Illinois Smelting & Refining Co. v. W. U. Tel. Co., 146 Ill. App. 163, and in Erb v. W. U. Tel. Co., 162 Ill. App. 494. In the former case although the message did relate to a business transaction it not being such as to advise the company that a failure to deliver it within a reasonable time would cause financial loss to the sender, it was held that such a loss was not in the sender's contemplation when the contract was made. The same rule of liability was recognized in Postal

The notice until the following Thursday when he called and got the
 message. In the meantime he would be concerned at his wife and
 went to appear in court on the same, which he was to appear
 in this case.

Has responsibility of the character of the person he has
 as damages, and responsibility of the question of fact whether there was
 any negligence on the part of defendant, questions we need not dis-
 cuss, under the authorities the character of the message is such that
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 damages beyond the charge for transmission, which, however, it does
 not appear plaintiff paid. It seems to me the better ruling of the
 courts on this subject that it is a question that may arise when the
 fact that it relates to a commercial transaction, message, whether in
 connection with the same as in a matter of the non-delivery message
 be recovered. The principle upon which the ruling is founded is
 that damages for a breach of contract are limited to what is due
 reasonably be supposed to have been in contemplation of both parties
 at the time the contract was made, as a probable result of the breach
 at it. The well known rule on this subject was laid down in Hadley
v. Baxendale, 9 Exch. 341, and has been generally followed in this
 country as well as in England. We follow the rule in Lithia
Imp. v. Lithia Springs Co., 101 Ill. 444, 104 Ill. 444, 105 Ill. 444, and in
 the message the relation is a business transaction it was found that
 as to relieve the company that a failure to deliver it within a reasonable
 time would cause financial loss to the plaintiff, it was held that
 even a loss was not in the contract's contemplation from the defendant
 was made. The same rule of liability was pronounced in Hadley

Telegraph Cable Co. v. Lathrop, 131 Ill. 575, and is generally followed in other jurisdictions. (Primrose v. W. U. Tel. Co., 154 U. S. 1; Kerr Steamship Co. v. Radio Corp. 245 N. Y. 284; W. U. Tel. Co. v. Hall, 237 Fed. 297; Fitch v. W. U. Tel. Co., 150 Mo. App. 149; 130 S. W. 44; W. U. Tel. Co. v. Kibble, 113 S. W. 643.)

We need not cite other authorities nor dilate on the well settled principles so generally followed upon which the cited cases rest. And regardless of their applicability we do not think there was proof of any negligence.

Accordingly as there was no evidence tending to support the cause of action the judgment is reversed.

REVERSED.

Gridley, P. J., and Scanlan, J., concur.

32663

250 I.A. 634⁴

J. D. FULRATH, doing business under
the name and style of FULRATH NASH
SALES,

Appellant,

v.

CHICAGO NASH COMPANY,
a corporation,

Appellee.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit for libel. A demurrer, general and special, to the declaration was sustained. Standing by the same defendant has appealed from the resultant judgment.

The alleged libelous article consisted of a letter addressed by defendant company to the owner of a Nash automobile, purchased through plaintiff as a selling agent for defendant, which is a so-called master dealer within territory in Chicago and Cook county for the Nash Sales Company, the distributor of Nash motor cars in Illinois. The selling agents appointed by defendant (including plaintiff) formed a voluntary association known as "Nash Dealers." These facts are appropriately set forth in the inducement, together with other matters that will be later referred to. The letter (together with the innuendoes set out in brackets) as set forth in the declaration, is as follows:

"June 28, 1926.

Mr. F. A. Sheeder,
Chicago, Ill.
Dear Sir:

Our records show that you are a member of our large family of Nash owners here in Chicago, (meaning that the addressee owns a Nash automobile) and that you purchased your car through the Fulrath Nash Sales

Company, 7937 South Chicago Avenue, (meaning the plaintiff doing business as Fulrath Nash Sales).

We (meaning Chicago Nash Company, Richard Wolfe, Secretary), have found it necessary to cancel that franchise (meaning that the contract of the plaintiff was broken because the plaintiff employed unethical business methods and was a 'gypper') and being responsible for sales and service in Cook County, we (meaning Chicago Nash Company, Richard Wolfe, Secretary,) naturally are much interested in your welfare, and in our desire to see that you are well taken care of, we cheerfully invite you to our main station for your service needs in the future. We have increased our facilities to an extent where we can give service promptly, and due to our labor saving devices, and mechanics who have a thorough knowledge of the Nash car, we know that our prices will be satisfactory.

The Nash Kullberger Sales Company, 1441-53 East 75th Street will succeed the Fulrath Nash Sales Company (meaning the plaintiff) as dealers in that particular district and should you wish any service work done on your car in that neighborhood we earnestly recommend them to you. They (meaning the Nash Kullberger Sales Company) have operated in their neighborhood for over eight years and have established a very enviable record for fair dealing (meaning that the plaintiff does not have a good record for fair dealing).

Yours very truly,

(Signed) Chicago Nash Company
Richard Wolfe,
Secretary.

Kenosha
N A S H
Wisconsin."

The statement contains allegations of several utterances or publications alleged to be false and malicious, which, it is claimed, when coupled with said letter render it defamatory in meaning, it being aptly alleged that said letter was communicated and shown by defendant to divers other persons than plaintiff and read by them, and that said divers other persons were among the individuals who read said malicious statements in writing and heard said malicious accusations.

Those utterances and publications, made mostly, if not all, within six months prior to the date and publication of said letter, may be summarized as follows:

- (1) In a conference called by defendant, at which

defendant's secretary Richard Wolfe, and one Brewer, general manager of the Nash Sales Company, were present, defendant accused plaintiff of unethical and improper business methods in selling Nash cars and with "gypping" or with being a "gypper" (derived from the word "gyp", meaning "swindler," "cheat", "fraudulent schemer") and later made the same accusations at a meeting of Nash dealers, and also at plaintiff's place of business in the presence of others.

(2) Defendant caused to be published and issued to diverse persons a letter to plaintiff notifying him that in view of his methods of merchandising Nash cars, it must discontinue relationship with him.

(3) On June 8, 1926, a letter was addressed and sent out to Nash dealers by the Nash Sales Company warning them against negotiating with or considering delivery of a "Nash" to plaintiff because of his unethical business methods, and stating it was determined to stop "gypper" business in Chicago on Nash cars.

The main question thus presented is, did the court, in determining whether in light of the inducement and colloquium the language of the letter in question would fairly bear the meaning ascribed to it by the innuendoes, properly hold that it was not libelous? If it did not so hold then of course whether such a meaning was intended was a question to be determined by the jury upon all of the evidence. (Commonwealth of Pennsylvania v. Swallow, 8 Pa. 613.)

As stated in McLaughlin v. Fisher, 136 Ill. 111, it is not permissible to enlarge and extend the meaning of words beyond their natural import by innuendo "except so far as such enlarged meaning is warranted by prefatory matter set forth in the inducement or colloquium." When coupled with extrinsic circumstances narrated in

defendant's secretary, William J. Hall, and one Edward J. Hall, general manager of the Hall-Johnson Company, both of whom, defendant suggested, might be contacted and interviewed by the FBI in order to obtain from each of them the "copy" of the letter which was "typewritten" (written from the word "copy" meaning "reproduction" or "copy") of the letter and which was sent to the defendant by a member of the Hall-Johnson Company, and also to the defendant's place of business in the business of Edward J. Hall, as stated in the defendant's letter to the defendant, dated as above.

(2) Defendant moved to be appointed and named as above persons a factor in the defendant's business and also in the defendant's methods of manufacturing and selling its own electrical equipment with Hall.

(3) On June 2, 1934, a letter was addressed and sent not to Hall-Johnson by the Hall-Johnson Company, which was signed by the defendant, and which was addressed to a "copy" of the defendant's letter to the defendant, and which was sent to the defendant because of his unusual business methods, and which is now being used to stop "copy" business in Chicago on June 2, 1934.

The letter was presented to the defendant, and the defendant, in testimony, stated in light of the defendant's and defendant's own language of the letter in question that the letter was the meaning ascribed to it by the defendant, and that it was not intended to be used as a basis of action against the defendant's business and intended to be a threat to be taken by the FBI upon all of the evidence. [Examination of defendant's letter to Hall-Johnson, dated June 2, 1934.]

As stated in defendant's letter to the FBI, it is not possible to enlarge and extend the meaning of words beyond their natural import by assuming "threat" as the only intended meaning as intended by defendant's letter and which is the defendant's collection. When sought with similar circumstances, it is

the statement they may bear a construction which renders them actionable, although when, as in the instant case, standing alone and not thus explained, they would not be. (Townsend on Slander and Libel, 4th Ed., sec. 308, p. 538; 17 R. C. L. 393.)

The question that first presents itself is, therefore, is the meaning conveyed by the innuendoes that "plaintiff employed unethical business methods and was a 'gypper,'" and "plaintiff does not have a record for fair dealing" warranted by such prefatory matter?

"The words of an alleged libelous article must be taken in the sense which persons of common and reasonable understanding would ascribe to them and all the words used in the article must be considered." (People v. Spielman, 318 Ill. 482; People v. Fuller, 238 Ill. 116.) What sense would be ascribed to the article or letter in question, bearing in mind it was addressed to a person and read by others who had knowledge of said previous utterances and writings?

As a mere business letter to Nash owners soliciting their patronage for future service needs and recommending defendant's agent in their particular district, it would seem unnecessary to direct attention to the "necessity" of canceling plaintiff's contract. Whether it was thus by indirection intended to call their attention to the claimed ground of such necessity would be a question for a jury upon the evidence adduced. And if the language, in view of the extrinsic circumstances brought to the attention of those to whom the publication of the letter came, is susceptible of more than one meaning and capable of such defamatory meaning by persons of common and reasonable understanding, then it would unquestionably tend to impeach the honesty, integrity, and reputation of plaintiff to his financial injury. We think it was capable of such meaning in so far

the statement that they were a conspiracy which rendered them
 notorious, although when, as in the instant case, standing alone
 and not then explained, they would not be. (Tennessee on Appeal
 and cited, 115 Ill. 2d, 401, 402, 17 N.E. 2d, 1001.)

The statement that these persons acted in a conspiracy,
 in the instant case, by the defendant, that "plaintiff employed
 immediate persons and was a 'partner,' and 'plaintiff was
 not have a interest in this building' rendered by such plaintiff
 nature?

"The words of an alleged libelous article must be taken
 in the sense which persons of common and reasonable understanding
 would ascribe to them and all the words used in the article must
 be considered." (Frazier v. Frazier, 115 Ill. 2d, 401, 402, 17 N.E. 2d, 1001.)

That some words be ascribed to the article as
 being in question, because in mind it was ascribed to a person
 and read by others who had knowledge of such previous statements
 and writings?

It is a well known fact that when persons editing their
 papers for the purpose of giving words and recommending statements
 which in their editorial capacity, it would seem necessary to
 almost entirely for the "conspiracy" of creating plaintiff's
 libel. (Tennessee on Appeal) 115 Ill. 2d, 401, 402, 17 N.E. 2d, 1001.

It is the claimant's duty to show that the defendant was a
 party to the conspiracy and that the defendant, in view of
 the existing circumstances, should be the attention of those to whom
 the publication of the article was, as suggested by the fact that
 being an article of such defamatory nature of persons of common
 and reasonable understanding, that it would necessarily tend to
 injure the plaintiff's property, and reputation of plaintiff as a
 financial entity. It is in this regard of such nature as to be

as it implied a charge that plaintiff was a "gypper," and thus not having a record for fair dealing.

While it may be questionable whether the letter of "warning" sent to the Nash dealers by the Nash Sales Company can be properly connected with the alleged defamatory article, yet it does not operate to render the pleading double. (Andrews' Stephen's Pleading, Ed. (1901), sec. 131.)

Nor is the declaration demurrable for failure to plead special damages. If the alleged defamatory article tended to prejudice and injure plaintiff in his trade and business it would be actionable without averment of special damages. (Beeson v. Lossard Co., 167 Ill. 561; Odin v. Niebuhr, 226 Mass. 350; Schinsel v. Vuyk, 213 N. Y. Sup. 135; Stannard v. Wilcox & Gibbs Sewing Machine Co., 84 Atl. 335; 118 Md. 151.)

We think the meaning attributed to the letter in question was warranted by the prefatory matter set forth in the statement and therefore the demurrer was improperly sustained.

REVERSED AND REMANDED.

Griddle, P. J., and Scanlan, J., concur.

250 I.A. 635¹

32666

HARRY BECKER,
Appellant,

v.

ABRAHAM KORSHAK and
TILLIE KORSHAK,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for defendants in an action tried without a jury brought by plaintiff for the return of \$1000 paid by him as earnest money on a written contract for the purchase of real estate.

The contract provided that defendants should convey a merchantable title, and as alleged in the statement of claim and admitted in defendants' affidavit of merits, that they should furnish plaintiff within a reasonable time one of three evidences of title, viz., (1) a certificate of title issued by the Registrar of Titles of Cook County, or (2) a complete merchantable abstract of title, or merchantable copy, brought down to date thereof, or (3) a "merchantable title guaranty policy for the purchase price by the Chicago T. & T. Co."

No one of these evidences of title was furnished, and on March 28, 1927, forty-one days after the contract was entered into, and at divers times thereafter prior to instituting this suit on September 19, 1927, plaintiff made a demand for the return of said earnest money which was never complied with.

It appears that the only attempt to comply with such provision of the contract was by way of a tender made April 1, 1927,

to plaintiff's attorney of an opinion of title by the Chicago Title & Trust Co., which he refused.

Said opinion of title was given in a letter addressed to defendants' attorney by the Chicago Title & Trust Co., stating that it had examined the title and that it was vested in one Ida Levinson, subject to certain encumbrances and objections. It is too plain for discussion that such letter or opinion of title is not a contract of guaranty or a guaranty policy. It was so held in Mackowiak v. Smith, 185 Ill. App. 305. Said opinion of title or letter does not even purport to be such a policy. In fact it is asked therein that the company be furnished with the name of the party to be guaranteed.

Furthermore, it shows that the title stands in a third party and not in defendants. The contract calls for a conveyance by them. Under the provision therefor plaintiff was entitled to their personal covenants as security and was not obligated to accept title from a third party. (Crabtree v. Levings, 53 Ill. 526; Hansen v. Miller, 44 Ill. App. 550, 563; Chicago Title & Trust Co. v. MacDonald, 192 Ill. App. 132.)

Appellees argue that when plaintiff on March 28 demanded the return of the earnest money a reasonable time for furnishing evidence of title had not elapsed. But it is admitted that plaintiff thereafter made repeated demands for the earnest money, and that even up to the time of bringing the action defendants had not complied with any of the provisions as to furnishing evidence of title. Hence they are not in a position to claim a breach of contract by plaintiff and forfeiture of the earnest money. On the contrary, he is entitled to the return of the money because of their non-compliance with the terms of the contract.

The judgment will be reversed and judgment entered here for appellant for \$1000, together with interest thereon at the rate of 5 per cent per annum from September 19, 1927, to date.

REVERSED AND JUDGMENT HERE.

Gridley, P. J., and Scanlan, J., concur.

32666

FINDING OF FACT.

We find that appellees failed to furnish appellant within a reasonable time, or at any time, one of the evidences of title enumerated in the contract that they agreed to furnish.

2225

2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 2681, 26

...the fact that the ...
...the fact that the ...
...the fact that the ...

32672

2501A. 635²

J. R. ROBERTS, Doing Business, etc.,
Defendant in Error,

vs.

L. S. MOORE and V. J. CONROY,
Plaintiffs in Error.

BROCK TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARRETT DELIVERED THE OPINION OF THE COURT.

The judgment appealed from was entered against both defendants on a promissory note for \$257.32 by confession and was confirmed after being opened up for a defense.

The note was executed by defendant Moore, payable to the order of plaintiff, and endorsed and guaranteed by defendant Conroy, and was secured by a chattel mortgage on an automobile owned by Moore.

Fearing that Moore was about to secrete himself and his assets Conroy went to Roberts' office to request that he take possession of the car under the mortgage. Not finding him there he made the request of one Norton, an employee or clerk of Roberts. The car stood at the time on the street nearby and Norton stepped out to it and locked it so that it could not be moved. Shortly afterwards Moore appeared and requested Norton to release the car, which he did.

The guaranty contract appeared on the back of the note in printed form and was absolute in character. It provided among other things that the holder of the note shall not be required to look to the security for payment but may proceed immediately upon a default in payment, or otherwise, and authorized a judgment by confession against the guarantor.

For reversal it is urged that the taking possession of the car and releasing it operated to discharge the guarantor

100-44033

RECEIVED
FEBRUARY 10 1944

W. A. ROBERTS, Chief Investigator,
FEDERAL BUREAU OF INVESTIGATION
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

TO: SAC, NEW YORK (100-44033)

The following information was received from the New York office of the Federal Bureau of Investigation on February 10, 1944:

The New York office of the Federal Bureau of Investigation has advised that the following information was received from the New York office of the Federal Bureau of Investigation on February 10, 1944:

It is noted that the New York office of the Federal Bureau of Investigation has advised that the following information was received from the New York office of the Federal Bureau of Investigation on February 10, 1944:

The New York office of the Federal Bureau of Investigation has advised that the following information was received from the New York office of the Federal Bureau of Investigation on February 10, 1944:

Conroy to the extent of its proven value, to-wit, from \$225 to \$250. The contention is that the principles of law with reference to the discharge of a surety apply and that the surrender of the car was inconsistent with Conroy's rights and released him to the extent of the injury occasioned by the act. Even if such principles could be invoked where the guaranty is an absolute one, the essential fact of a surrender of the security is assumed, for it does not appear that Norton possessed any authority to take possession of the car for Roberts under the mortgage. While Norton was referred to as manager of Roberts' office there was no proof of the extent of his authority as an agent for Roberts, and hence no proof binding the latter as to the fact of surrender.

But it is an established principle of law that "where the guaranty is an absolute one and the creditor has also other security, he need not proceed against the security but may at once sue the guarantor on the default of the principal debtor." (28 Corpus Juris, p. 979, and cases there cited.) In the same volume, p. 1008, it is also said: "Nor where the guaranty is an absolute one, is it any defense to the guarantor that the creditor had been negligent in regard to protecting and enforcing collateral security." (Citing Hess Sav. Bank v. Shallenberger, 95 Neb. 593, 146 N.W.993.)

In this view of the case the judgment of the court below must be affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

32685

WILLIAM H. SMITH,
Appellee.

vs.

ILLINOIS CENTRAL RAILROAD
COMPANY,
Appellant.

25011 1353
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a suit to recover damages for personal injuries received by plaintiff while in defendant's employ. The verdict was for \$35,000. On a remittitur of \$7,000 judgment was entered for the remainder. This appeal followed.

The verdict and judgment rest solely on alleged violation of the Federal Safety Appliance Act.

Defendant is engaged in both interstate and intrastate commerce. At the time of the accident in question it was engaged in the latter in the course of a switching operation wherein plaintiff, in his line of duty, grabbed hold of a grabiron at the front of a freight car. It being loose or otherwise defective he fell, with resulting injuries.

Appellant's first contention relates to the remedy. It is urged that as no civil remedy is expressly provided for in the Federal Safety Appliance Act some other law must be looked to for a remedy, and that the only law of the forum of this State providing a remedy is the Workmen's Compensation Act, and that should be resorted to.

The contention is hardly open to discussion in this court, for the identical question has been decided to the contrary by our Supreme Court in Kenna v. C. R. & S. E. R. R. Co., 284 Ill. 301. That the remedy of a civil action for damages by a party for whose benefit the Safety Appliance Act was passed is implied has also been

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2000年12月11日 星期五 晴

4.3. The above set of eight theorems is the main result of this paper.

100-443887-100

Approved: _____ Date: _____

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Approved for Release 2001/08/06 : CIA-RDP80-01060A000100010001-6

CONFIDENTIAL

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at an estimated population of about 100,000, and as such, among the 100

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10. *History of the Church*

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DAVID L. HARRIS

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held by the Supreme Court of the United States in Texas & Pacific R. R. Co. v. Rigaby, 241 U. S. 33, and San Antonio and Arkansas Pass Ry. Co. v. Wagner, id. 476, even though the injured employee was not at the time of the injury engaged in interstate commerce.

The fact that there was no Workmen's Compensation Act in force in the State of Texas, where the former action arose, can not be deemed important, as suggested in appellant's argument, in determining whether the Act carries such implication. Even though there be a Compensation Act in the forum where the suit is brought, yet as held in Ross v. Schooley, 257 Fed. 290, Congress having created a liability for damages for a violation of the Act it could not be altered or impaired by State Compensation Acts. A certiorari was denied in that case. (249 U. S. 615.) It is a familiar doctrine that "when Congress acts upon the subject all State laws covering the same field are necessarily superseded by reason of the supremacy of the national authority." (E. Y. Cent. R. R. Co. v. Winfield, 244 U. S. 147.) The authorities cited being conclusive of the question as to the remedy it would be superfluous to recite or discuss others.

It is next urged that a new trial should have been granted on the ground of excessive damages. Of course, if the verdict was so flagrantly excessive as to be accounted for only on the grounds of passion, prejudice or misconception, the remittitur would not cure the error. While the verdict was a large one, and so recognized by the court in requiring a remittitur, we find nothing in the record, and are pointed to nothing other than the amount itself, which indicates that the verdict was the result of passion, prejudice or misconception.

The facts are undisputed. Plaintiff was 33 years old. He had been a switchman or a brakeman for about 12 years. He left school when in the fourth grade. His earnings averaged from \$180

to \$190 per month. His whole left foot was cut and crushed at the bottom all the way back to the heel and ankle. The day after the accident three of his toes were removed. Twelve days later his big toe and the ball of his foot were removed. Only the little toe remained on the foot. He was in the hospital about two months. Up to the date of the trial, eight months later, his foot had to be dressed every day, and was still raw and continued to discharge. It was not weight-bearing. To become so would require the removal of the distal portion of the foot so as to leave the heel bone and one at the ankle joint, thus giving a sort of peg-leg. He might thus get around with a limp but could not engage in any occupation that would involve balancing himself with both feet or one. Disqualified as he is from lack of education for ordinary clerical positions and restricted almost entirely to manual labor, it is apparent that his field of remunerative employment will be greatly limited for the rest of his life. He is still a young man, with apparently a long expectancy of life. His handicap through life is most serious.

Appellant has cited many cases, mostly from other jurisdictions, or from a period preceding the war, when economic conditions and the purchase power of money were quite different, in which damages for much lesser amounts were reversed or not permitted to stand without a remittitur. Many cases, however, are cited by appellee from this and other jurisdictions involving similar states of fact, where the injuries were no severer or more serious and where quite as large and even larger verdicts were permitted to stand. Several of these cases involve as elements of consideration the facts of limited education, restricted opportunities for future employment or advancement, changes in economic conditions, depreciation of our currency, and pain and suffering endured. (Posch v. Ch. Rys. Co., 221 Ill. App. 241; Kavale v. Morton

24 TWO per month. His whole life had been one of struggle and
 bottom all was now back to the back and center. The day after the
 accident three of his toes were severed. Twelve days later the
 toe and the ball of his foot were removed. Under the little toe
 remained on the foot. He was in the hospital about two months.
 Up to the time of his injury, which occurred later, his foot had to
 be dressed every day, and was still raw and sensitive to the touch.
 It was not enlarged-hearing. In persons so badly treated the removal
 of the distal portion of the foot so as to leave the heel bone and
 one of the middle joints, thus leaving a heel of varying size, is
 thus not secured with a limp but would not engage in any occupation
 that would involve balancing himself with both feet on one. His
 position as he is from lack of protection for ordinary walking
 positions and restricted almost entirely to manual labor. It is
 reported that his view of remunerative employment will be greatly
 limited for the rest of his life. He is still a young man, with
 apparently a fine opportunity of life. His condition through this
 is most serious.

Treatment has since been given, mostly from other
 hospitals, or from a period preceding the war, when economic
 conditions and the purchase power of money were still different,
 in which because of the high hospital charges were reduced to the
 point of being almost a negligible thing, money, however,
 are also by accident from time to time hospitalization involving
 either state or local, where the patient would be covered or have
 serious and more pain as large and even larger hospital care
 permitted to stand. Several of these cases involve an element of
 consideration that leads to limited treatment, restricted opportunity
 also for future employment or advancement, though in some cases
 illness, incapacitation of one or more, and pain and suffering are
 noted. (Trans. of the Am. Soc. for the Adv. of the Blind)

Salt Co., 242 Id. 205; Lanyon v. Lonquist et al., 157 Id. 316; Baranski v. Yellow Cab Co., 237 Id. 642; Sobieski v. City of Chicago, 239 Id. 659; Dunn v. Chicago, R. I. & P. Ry. Co., 248 Id. 26; Lagatuite v. Chicago Daily News, 239 Id. 675; Forsman Bros. Banking Co. v. Consumers Co., 226 Id. 662.)

The injuries sustained in the several cases cited are not so different from those in the case at bar in their resultant effects of pain and suffering, impairment of the victim's earning power and the restrictions imposed on his advancement and enjoyment of the ordinary comforts of life that any valid distinction can be made between those cases and this on the question of excessive damages. The many cases cited from our own jurisdiction bearing on the subject render it unnecessary to cite authorities from other jurisdictions in harmony with them.

We recognize that the amount of damages in each case depends upon its peculiar circumstances and is not susceptible of exact mathematical computation. It is the particular province of the jury to determine the amount of the damages, and reviewing courts will not substitute their judgment for that of the jury unless it appears to be the result of passion, prejudice or misconception. We are not able to say in this case that the verdict was the result of any of these or of any other improper element.

Reaching this conclusion it is unnecessary to discuss appellee's point that there is not a proper assignment of error upon which the claim of an excessive judgment rather than an excessive verdict can be urged.

We think the judgment should be affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

[illegible]

See the details of my life at these and at my other places of abode.
 Nevertheless, I am not able to say in this case that the matter
 unless it appears to be the result of some investigation or other
 source will not otherwise be followed. The fact is that the
 the way to determine the nature of the matter, and therefore
 stated and admitted completely. It is the position of the
 person with the specific circumstances and is not responsible for
 the investigation that the matter is known to be true.

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CONCLUSIONS

1990-1991, 1991-1992, 1992-1993, 1993-1994, 1994-1995, 1995-1996, 1996-1997, 1997-1998, 1998-1999, 1999-2000, 2000-2001, 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, 2018-2019, 2019-2020, 2020-2021, 2021-2022, 2022-2023, 2023-2024, 2024-2025, 2025-2026, 2026-2027, 2027-2028, 2028-2029, 2029-2030, 2030-2031, 2031-2032, 2032-2033, 2033-2034, 2034-2035, 2035-2036, 2036-2037, 2037-2038, 2038-2039, 2039-2040, 2040-2041, 2041-2042, 2042-2043, 2043-2044, 2044-2045, 2045-2046, 2046-2047, 2047-2048, 2048-2049, 2049-2050, 2050-2051, 2051-2052, 2052-2053, 2053-2054, 2054-2055, 2055-2056, 2056-2057, 2057-2058, 2058-2059, 2059-2060, 2060-2061, 2061-2062, 2062-2063, 2063-2064, 2064-2065, 2065-2066, 2066-2067, 2067-2068, 2068-2069, 2069-2070, 2070-2071, 2071-2072, 2072-2073, 2073-2074, 2074-2075, 2075-2076, 2076-2077, 2077-2078, 2078-2079, 2079-2080, 2080-2081, 2081-2082, 2082-2083, 2083-2084, 2084-2085, 2085-2086, 2086-2087, 2087-2088, 2088-2089, 2089-2090, 2090-2091, 2091-2092, 2092-2093, 2093-2094, 2094-2095, 2095-2096, 2096-2097, 2097-2098, 2098-2099, 2099-2100, 2100-2101, 2101-2102, 2102-2103, 2103-2104, 2104-2105, 2105-2106, 2106-2107, 2107-2108, 2108-2109, 2109-2110, 2110-2111, 2111-2112, 2112-2113, 2113-2114, 2114-2115, 2115-2116, 2116-2117, 2117-2118, 2118-2119, 2119-2120, 2120-2121, 2121-2122, 2122-2123, 2123-2124, 2124-2125, 2125-2126, 2126-2127, 2127-2128, 2128-2129, 2129-2130, 2130-2131, 2131-2132, 2132-2133, 2133-2134, 2134-2135, 2135-2136, 2136-2137, 2137-2138, 2138-2139, 2139-2140, 2140-2141, 2141-2142, 2142-2143, 2143-2144, 2144-2145, 2145-2146, 2146-2147, 2147-2148, 2148-2149, 2149-2150, 2150-2151, 2151-2152, 2152-2153, 2153-2154, 2154-2155, 2155-2156, 2156-2157, 2157-2158, 2158-2159, 2159-2160, 2160-2161, 2161-2162, 2162-2163, 2163-2164, 2164-2165, 2165-2166, 2166-2167, 2167-2168, 2168-2169, 2169-2170, 2170-2171, 2171-2172, 2172-2173, 2173-2174, 2174-2175, 2175-2176, 2176-2177, 2177-2178, 2178-2179, 2179-2180, 2180-2181, 2181-2182, 2182-2183, 2183-2184, 2184-2185, 2185-2186, 2186-2187, 2187-2188, 2188-2189, 2189-2190, 2190-2191, 2191-2192, 2192-2193, 2193-2194, 2194-2195, 2195-2196, 2196-2197, 2197-2198, 2198-2199, 2199-2200, 2200-2201, 2201-2202, 2202-2203, 2203-2204, 2204-2205, 2205-2206, 2206-2207, 2207-2208, 2208-2209, 2209-2210, 2210-2211, 2211-2212, 2212-2213, 2213-2214, 2214-2215, 2215-2216, 2216-2217, 2217-2218, 2218-2219, 2219-2220, 2220-2221, 2221-2222, 2222-2223, 2223-2224, 2224-2225, 2225-2226, 2226-2227, 2227-2228, 2228-2229, 2229-2230, 2230-2231, 2231-2232, 2232-2233, 2233-2234, 2234-2235, 2235-2236, 2236-2237, 2237-2238, 2238-2239, 2239-2240, 2240-2241, 2241-2242, 2242-2243, 2243-2244, 2244-2245, 2245-2246, 2246-2247, 2247-2248, 2248-2249, 2249-2250, 2250-2251, 2251-2252, 2252-2253, 2253-2254, 2254-2255, 2255-2256, 2256-2257, 2257-2258, 2258-2259, 2259-2260, 2260-2261, 2261-2262, 2262-2263, 2263-2264, 2264-2265, 2265-2266, 2266-2267, 2267-2268, 2268-2269, 2269-2270, 2270-2271, 2271-2272, 2272-2273, 2273-2274, 2274-2275, 2275-2276, 2276-2277, 2277-2278, 2278-2279, 2279-2280, 2280-2281, 2281-2282, 2282-2283, 2283-2284, 2284-2285, 2285-2286, 2286-2287, 2287-2288, 2288-2289, 2289-2290, 2290-2291, 2291-2292, 2292-2293, 2293-2294, 2294-2295, 2295-2296, 2296-2297, 2297-2298, 2298-2299, 2299-2300, 2300-2301, 2301-2302, 2302-2303, 2303-2304, 2304-2305, 2305-2306, 2306-2307, 2307-2308, 2308-2309, 2309-2310, 2310-2311, 2311-2312, 2312-2313, 2313-2314, 2314-2315, 2315-2316, 2316-2317, 2317-2318, 2318-2319, 2319-2320, 2320-2321, 2321-2322, 2322-2323, 2323-2324, 2324-2325, 2325-2326, 2326-2327, 2327-2328, 2328-2329, 2329-2330, 2330-2331, 2331-2332, 2332-2333, 2333-2334, 2334-2335, 2335-2336, 2336-2337, 2337-2338, 2338-2339, 2339-2340, 2340-2341, 2341-2342, 2342-2343, 2343-2344, 2344-2345, 2345-2346, 2346-2347, 2347-2348, 2348-2349, 2349-2350, 2350-2351, 2351-2352, 2352-2353, 2353-2354, 2354-2355, 2355-2356, 2356-2357, 2357-2358, 2358-2359, 2359-2360, 2360-2361, 2361-2362, 23

MORRIS FELDMAN, NATHAN R. FELDMAN,
DAVID I. FELDMAN and ABRAHAM FELDMAN,
Copartners Doing Business as R.
FELDMAN & SONS,
Plaintiffs.

vs.

SAMUEL SCHULMAN,
Defendant.

SAMUEL SCHULMAN for the use of
NATHAN R. FELDMAN et al.,
Appellant,

vs.

OSCAR KATZ, Garnishee,
Appellee.

250 LA 685⁴

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in the Municipal court finding the issues for the garnishee, O. Katz, in a garnishment proceeding based upon a judgment for \$137.80 in favor of Morris Feldman et al., against Samuel Schulman.

After due service of summons on the garnishee, conditional judgment was entered against him on default for want of appearance June 17, 1927. The garnishee again failed to appear on service of the writ and an alias writ of scire facias and final judgment for said sum was entered against him October 19, 1927, as of June 19, 1927. An execution was issued thereon and returned "No property found."

On December 2 an order was entered on the motion of the garnishee vacating and setting aside said judgment. The next day, however, on the garnishee's motion, the court ordered plaintiffs to contest the garnishee's answer. No answer appears to have been filed at that time. But a petition setting forth the garnishee's grounds for the motion, sworn to on December 1, though not filed until December 6, 1927, was evidently treated as such.

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On December 2, 1947, the following information was received from the Bureau of the Census, Washington, D. C., regarding the activities of the Communist Party, U. S. A., in the United States:

The cause came up for hearing January 9, 1928, on the issues taken by an answer of plaintiffs to the petition, when, as appears by the bill of exceptions, the garnishee was examined and answered "No funds or property in his hands," etc. Whereupon the court discharged him and this appeal was taken.

Plaintiffs objected to the court's entertaining the petition for want of jurisdiction, more than thirty days having elapsed since the rendition of the final judgment against the garnishee. The several defaults of the garnishee to appear, as aforesaid, are not denied, but the petitioner seeks to justify his neglect to appear by averring that he did appear on the return date of the spire facias (which was August 23, 1927), and answered that he had no funds, etc., that plaintiffs contested the answer, and the cause was set down for a hearing. The record discloses no such state of facts, nor proof of the same on hearing the petition. The petition further avers that at said hearing petitioner submitted his books and memoranda for examination; that on the suggestion of plaintiffs' counsel the cause was continued with instructions to him that he personally attend at the office of petitioner and make a personal investigation and "report" whether he found any assets belonging to defendant, and, if he did, the court would then enter a judgment for the amount thereof, and if the court was not apprised of so finding any such assets in the garnishee's possession it would discharge petitioner without any further examination.

The petitioner further averred that he was ready at all times to submit his books for examination, that counsel for plaintiffs never appeared at his office as so instructed nor informed petitioner of his desire to be present thereat, but waited until the cause was called on the continued date (referring evidently to October 19, 1927?) and obtained said final judgment

"without any representation to the court of the circumstances" as alleged. The petitioner then avers that it was negligence on the part of plaintiffs' counsel not to recall to the court's attention the circumstances under which the continuance was originally granted.

While plaintiffs' answer takes ^{issue} on the immaterial fact whether they were to appear at petitioner's office, and alleges that the examination was to be gone into at the continued hearing, it is apparent from the face of the garnishee's petition, which fails to set up anything in the nature of fraud, accident or mistake, that prevented ^{him} \angle from appearing on October 19, to which the hearing was continued, that it presents nothing which gave the court equitable jurisdiction conferred upon it by Section 21 of the Municipal Court Act. Nor does it set forth any mistake of fact unknown to the court when final judgment was entered against the garnishee that would support a motion in the nature of a writ of coram nobis. If reliance is placed upon the averment in the petition that the garnishee was actually present and filed his answer on the date final judgment was entered, the fact is not preserved in the record by any recitals in the orders or by evidence. There is no finding of the court that such averments were sustained by evidence, nor any order of record continuing the cause beyond the date when the final judgment was entered. The averments in the petition contradict the record in this respect. The judgment was entered on the garnishee's default to appear and answer. Were this not the fact petitioner might have introduced evidence thereof in support of his petition. According to the petition the cause was continued to the date of the final judgment to receive "a report" by plaintiffs' counsel (on which, of course, no judgment could properly be entered.) Manifestly the garnishee understood that a final order of some character was to be entered on that date. But

he admittedly failed to appear, and, as shown by the record, he was defaulted for want of appearance. His neglect to appear at that time and present any legal defense he had, would defeat any claim he otherwise might have for relief under Section 21 of the Municipal Court Act or a motion in the nature of coram nobis. There was nothing in the nature of fraud, accident or mistake set up in the petition that prevented him from so appearing and availing himself of any legal defense he may have had. Hence, the default must be attributed to his own negligence. In such a case no relief can be had in equity (Bardonski v. Bardonski, 144 Ill. 284; 12 Am. & Eng. Ency. 145; Am. Surety Co. v. Elias, 214 Ill. App. 463), nor by motion in the nature of a writ of coram nobis. (Cramer v. Commercial Men's Assn., 260 Ill. 516.)

Objection to entertaining the petition for want of jurisdiction of the court should, therefore, have been sustained. The order setting aside the final judgment was, therefore, a nullity and must be reversed, thus leaving the final judgment against the garnishee to stand in full force and effect.

REVERSED.

Gridley, P. J., and Scanlan, J., concur.

It is respectfully requested that you be advised of the results of the investigation and the results of the investigation of the case of the above named individual.

The following is a list of the names of the persons who have been
 named in the report of the committee on the subject of the
 investigation of the case of the late Mr. J. H. P. [Name]
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Approved for Release by NSA on 09-11-2013 pursuant to E.O. 13526

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Investigations will continue until the cause of the problem is identified.

Journal of Health Politics, Policy and Law

J. H. B. J. J. J. J. J.

STELLA OUTER,
Appellant,

vs.

THE SECURITY BENEFIT
ASSOCIATION, a Corporation,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action of assumpsit on a life insurance policy in which there was an instructed verdict for defendant. The appeal presents as the main question whether the instruction was erroneous.

The application for the policy was made a part thereof and the statements and answers of the insured therein were made warranties.

The family record of the applicant as given in the application showed his father died of acute pulmonary tuberculosis, and his mother of pneumonia and that tuberculosis was not a factor of her decease. Defendant's proof, however, shows that the mother also died of tuberculosis.

The answer to whether either parent had ever been afflicted with consumption was "No." While thus inconsistent on its face with the answer as to the cause of the father's death, it was nevertheless untrue as to the cause of the mother's death.

The court rejected offered evidence in rebuttal tending to show that defendant's agent, a doctor, was told and filled out the application, was apprized of the real facts by the applicant or plaintiff, his sister, who aided the insured in giving the answers, and that the doctor assured them that the death of both parents by tuberculosis "would make no difference," and said he would put down "pneumonia" as the cause of the

25014.685

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THE BUREAU OF INVESTIGATION IS CURRENTLY IN THE CHARGE
AND PROSECUTION

father's death, and that neither she nor the applicant read over the answers and supposed that they were correctly filled in.

The ruling was correct. There was no charge of fraud by defendant and the offered evidence was not only repugnant to the rule against varying an unambiguous instrument by oral testimony but indicated collusion to misrepresent material facts to the company which would not only not be binding on defendant, because it is beyond the scope of an agent to perpetrate fraud against his principal, but would preclude recovery by the beneficiary because a party to the fraud even though she and the applicant were assured by the doctor or agent that it was "all right." (Ryan v. World Mut. Life Ins. Co., 41 Conn. 166.)

To question 10 in the application whether the applicant had within the past two years lived with or in any way been associated with anyone who was afflicted with consumption, the answer was in the negative and also untrue. In his application the applicant warranted the answers to be true, full and correct, agreed that they should be held as warranties and considered part of the contract, and declared that he had verified, knew and understood the same, and that they were as given by him.

But even if the pleadings had charged fraud against the applicant the evidence did not support it. There was no proof of an effort to deceive or mislead him. What was said in a similar case is applicable here: "He is not shown to have been unable to read or wanting in ordinary intelligence. The statements of the application were before him, and no effort was made to prevent his reading them or having them read by others. *** His act has every appearance of having been wholly uninfluenced, voluntary and deliberate." (Hartford L. & A. Ins. Co. v. Gray, 91 Ill. 159.) The beneficiary, who was present and helped the applicant in his answers, on being called as defendant's witness, identified the application

and her signature thereto as a witness, and testified that the insured, whose medical death certificate shows that he died May 21, 1926, of pulmonary tuberculosis, was living with his parents when his mother died in 1918, of bilateral pulmonary tuberculosis, and with the father when he died in April, 1925, of pulmonary tuberculosis. The medical certificate of death of the insured also states that his disease was contracted "at home." These facts being contrary to the applicant's statements and answers and untrue, and being material, whether regarded as warranties or representations, rendered the policy void.

On the principle that notice to the agent is notice to the principal it is urged that because the father of applicant was a member of the same lodge as the applicant and the lodge had notice of his death from tuberculosis defendant is in no position to declare a forfeiture on incorrect information in the application, especially as the applicant gave correct information as to the cause of the death of his parents. Evidence that he gave correct information was rejected for reasons as aforesaid, and while the application correctly stated the cause of his father's death it did not that of the mother's. The evidence does not disclose notice to defendant as to the cause of her death prior to the death of the insured. Hence, whether or not defendant was chargeable with notice of the cause of the father's death is immaterial so long as it did not receive notice of the cause of the mother's death. Besides, it appeared that applications were sometimes accepted where only one parent was afflicted with tuberculosis.

The certified medical death certificates from the Health Department of Chicago showing the causes of death of the parents and of the insured were prima facie evidence of the facts therein stated. (See Act June 22, 1915, Cahill's Stats. 1925, sec. 20 Ch. 65a; Hamer v. Globe Mut. Life Ins. Co., 243 Ill. App. 169.)

The judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

32716

250 I.A. 636'

JOHN SULLIVAN,
Appellee,

vs.

RUDOLPH BASKER,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal presents the question whether the court properly over-ruled defendant's motion to vacate and set aside a judgment by confession after the same had been opened up and a trial had on the issues raised by defendant's petition that was allowed to stand as his affidavit of merits.

The facts are not disputed. The judgment by confession was taken for rent due for May, 1927, under a lease for an apartment which expired September 30, 1927. The lease provided for a subletting or assignment of the same with plaintiff's consent. Defendant being desirous of purchasing and occupying other premises received a promise from plaintiff in April, 1927, that he would consent to a sublease or assignment provided defendant furnished at his own expense a responsible tenant and would guarantee the rent for the remainder of the term. Defendant procured several persons who were willing to rent the premises for the remainder of the term. Plaintiff made it a condition for them to enter into a lease for a longer period and refused their applications. Thereupon defendant moved out of the premises in April, 1927, and refused to pay the May rent, for which this action was brought. When he vacated the premises plaintiff put up a "For Rent" sign.

It is appellant's contention that he was relieved

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from liability (1) by plaintiff's breach of the parol agreement to allow him to move and sublet, and (2) by his surrender of the lease and acceptance thereof by plaintiff; and that regardless of either, plaintiff could not recover damages, having refused to accept responsible tenants and to take diligent action to mitigate defendant's damages.

We think none of these contentions under the facts and circumstances in evidence is tenable.

The parol agreement was no modification or different from the written lease with respect to defendant's liability for the rent for the remainder of the term. The lease provided for a subletting or assignment subject to plaintiff's consent, without, however, releasing defendant from liability for future rent. His guarantee of the same by said parol agreement gave plaintiff no additional security, and as plaintiff's oral promise to sublet was not supported by any additional consideration, he was not obligated to consent. It was a mere nudum pactum. (Goldsborough v. Gable, 140 Ill. 269, 274.)

As to the claim of surrender and plaintiff's acceptance thereof, it is sufficient to say that the facts do not constitute a surrender in law. Permitting defendant to vacate without a release from his obligation to pay rent did not constitute a surrender and termination of the lease or obligations thereunder. Even if plaintiff had accepted one of the proffered tenants defendant would not be released from the express covenant in the lease to pay rent unless such was the landlord's intention.

(Barnes v. Northern Trust Company, 160 Ill. 112.) That he had no such intention is recognized by defendant's verbal guaranty as a part of the agreement. That there may be a parol surrender of a written lease is not questioned. But this is not a case of an executed agreement to surrender without further obligation by the

defendant. Of course, where the lessee abandons the premises the lessor should exercise reasonable diligence to re-rent the same. In such a case the measure of damages is the rent agreed to be paid less whatever the landlord could have made out of the premises by the use of diligence after the same came into his possession. But there was no evidence here as to the responsibility of the alleged proposed tenants. For aught that appears to the contrary the landlord may have exercised his right to refuse to accept any of the proffered tenants, the written lease having given him the right to exercise his judgment in that matter. (Millers Mutual Casualty Co. v. Insurance Exchange Corp. et al., 218 Ill. App. 12, 18.) It will not be presumed in the absence of evidence of their financial responsibility that plaintiff acted in bad faith in refusing to accept any of the proffered tenants and that he rejected them solely because he sought a longer term lease. We think the judgment should be affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

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32761

GEORGE M. BUCHANAN,
Appellant,

vs.

W. A. JONES FOUNDRY &
MACHINE COMPANY,
Appellee.

250 I.A. 636²

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant claims \$77.06 from appellee for three weeks wages earned in November, 1927, and brought this suit to recover the same.

Claiming to be an assignee of the claim the Manufacturers Outlet Piano Stores, Inc., by leave of court, and on agreement of the parties, filed a petition setting up the assignment and notice thereof to appellee, and thereupon was permitted to appear and participate in the trial nominally as "a defendant."

The trial was without a jury, and a judgment was entered against appellee for \$17.06, on the court's assessment of damages for that amount.

While petitioner was thus apparently given leave to intervene in an informal and unauthorized manner it did not in fact become a party to the case or to the judgment. The bill of exceptions discloses that petitioner was treated merely as a witness for defendant, and that its testimony was adopted by defendant as its defense to liability to plaintiff, and upon the strength of that evidence the court reduced the liability of defendant to plaintiff to the extent of \$60, which, it appeared from the evidence, was all that was due from plaintiff to petitioner under the assignment at the time the suit was brought. In the very nature of petitioner's claim it could not be made a defendant in an action at law. It

might have brought a suit against appellee in appellant's name for its own use, or in its own name under Section 18 of the Practice Act. Or it could have been made a defendant along with appellant to a bill of interpleader in a proper court had appellee seen fit to file it.

But the title of the action was not changed and it continued to be one between appellant as plaintiff and appellee as defendant in which evidence of the assignment was admissible as a defense, and in effect received as such. In other words, defendant did not question the amount of plaintiff's wages or the validity of the assignment, but relied on the latter as conveying away plaintiff's personal right to the cause of action. As defendant does not assign cross error to entry of a judgment for the balance of \$17.06 arrived at by deducting the amount of \$60 due from plaintiff to petitioner under the assignment at the time the suit was brought, and the evidence warranted a deduction of at least that amount against plaintiff's claim, and as the intervenor has no standing in the case, the judgment will be affirmed.

AFFIRMED.

Gridley, F. J., and Scanlan, J., concur.

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32798

E. J. PAULER,
Appellant.

v.

ROBERT F. BATES,
Appellee.

250 I.A. 636³

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Inserted in the record of this case was a statement submitted to and certified by the trial judge as a correct statement of the facts appearing upon the trial thereof and of all questions of law involved in the case. While the statement was evidently submitted with the intention of complying with section 23 of the Municipal Court Act and to furnish such a record for review as is authorized by said section, the statement not being such as certified to, namely, a statement of facts and of all questions of law involved, but being apparently a mere stenographic report of the proceedings at the trial we, in conformity with previous rulings of the court, struck the same from the record. (People v. Dietrich, 166 Ill. App. 201, 213; Seehausen, Behrs & Co. v. Interstate Steel & Iron Co., 150 Ill. App. 179; Allen v. Roughton, 175 Id. 380.)

All the assignments of error are predicated upon the rulings of the court in the admission and exclusion of evidence and upon various motions, and as none of them is properly preserved for review, the record presents nothing for our consideration.

It appears from the clerk's record a judgment by confession was opened up and on a hearing had, a verdict was rendered for defendant. There is inserted therein the petition on which the order opening up the judgment was entered, and it is urged that it was insufficient to authorize the order. But we cannot take cognizance of it for it has no place in, and does not by such insertion become a part of the common law record. (People v. Faulkner, 248 Ill. 158; Patton v. Young, 233 Ill. App. 515.)

Besides, it would have been necessary to have preserved in proper form objections, if made, to the sufficiency of the petition or of the grounds of the motion as set up therein, to entitle the point to consideration. (Carlton-Ferguson Dry Goods Co. v. Langenfeld, 194 Ill. App. 96, 100.)

Appellant has not, however, assigned as error the ruling of the court in opening up the prior judgment.

Whatever may have been the merits of appellant's contentions in the court below they are not presented in a form authorized by our practice for a review of them.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

32372

2501A. 6364

WEST MADISON STATE BANK,
a corporation,
Appellee.

v.

JOSEPH A. MUDD and
B. H. LANCASTER,
Appellants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, the West Madison State Bank, a corporation, plaintiff, sued Joseph A. Mudd and B. H. Lancaster, defendants, in an action of assumpsit. By agreement the case was tried before the court without a jury. The issues were found for the plaintiff and damages were assessed in the sum of \$5000. Judgment was entered on the finding and this appeal followed.

In the lower court this case and West Madison State Bank, a corporation, v. Joseph A. Mudd, were tried at the same time, and counsel for the plaintiff, in the trial court, stated: "We are virtually trying the two together," and counsel for the defendants followed a like procedure. Testimony offered, by agreement, was considered as given in both cases. In the second case the trial court found the issues for the plaintiff and assessed its damages in the sum of \$2520. Judgment was entered on the finding, and that case is now pending in this court on appeal (Gen. No. 32373). It has been suggested that the two cases be considered together in this court.

In the instant case the declaration alleged that the Chicago Motor Sales Company, on December 10, 1923, executed its promissory note for \$1000, payable to the order of the plaintiff,

which note was renewed March 14, 1924, June 14, 1924, September 16, 1924, December 16, 1924, March 16, 1925, and May 16, 1925, by which latter renewal note said Chicago Motor Sales Company promised to pay plaintiff, on July 14, 1925, the sum of \$1000 with interest at seven per cent, etc.; that on December 29, 1924, the said Company executed its promissory note, payable to the order of the plaintiff, for the sum of \$2000, which note was renewed March 31, 1925, and again on May 29, 1925, for the sum of \$1,200, which latter note, with interest at seven per cent, became due July 21, 1925; that on December 22, 1924, the Chicago Motor Sales Company executed its promissory note for \$3,000, payable to plaintiff, which note was renewed March 23, 1925, and May 23, 1925, by which latter note the Sales Company agreed to pay the plaintiff \$3,000 on July 21, 1925, with interest at the rate of seven per cent; that on November 1, 1923, the defendants executed a written instrument guaranteeing the payment of said sums of money and said promissory notes, which instrument reads as follows:

"West Madison State Bank,
4011 W. Madison St.
Chicago, Illinois.

For value received, the undersigned and each of the undersigned, hereby become a party to, adopt, agree to, accept, guarantee and assume all the terms, conditions contained in the note or notes signed by the Chicago Motor Sales Company, by Frank K. Mudd, Jr., and Ray Lancaster and by them endorsed up to \$5000.00.

We hereby guarantee the payment of said note at maturity and consent without notice to any and all extensions of time made by the holder of said note or notes.

(Signed) Jos. E. Mudd
B. H. Lancaster

Subscribed and sworn to this 1st day of November, 1923.

(Seal) W. A. Blumthal,
Notary Public."

The declaration further alleges that the defendants have not paid the plaintiff the amount of said notes or any part thereof.

On November 1, 1923, the plaintiff held a promissory note

for \$1,500, payable to its order and executed by the Chicago Motor Sales Company. The Sales Company needed additional credit and in order to aid it in securing the same the defendants on that date signed the guaranty pleaded in the declaration. The evidence tends to show that the form of the instrument was furnished by the Bank. On the same date and contemporaneously with the signing of the guaranty the Sales Company executed its promissory note for \$2,500, payable to the order of the plaintiff. Plaintiff's evidence is that the note for \$1,500 was "renewed" on January 23, 1924, April 26, 1924, and July 28, 1924; that the note for \$2,500 was "renewed" February 29, 1924, July 1, 1924, and November 5, 1924; that neither of said notes nor any of the "renewals" of the same were paid when due; that some time "after July 28, 1924, both of these notes were put together and combined into one note of \$4000. That note of \$4000 was renewed November 5, 1924, renewed February 4, 1925, renewed May 4, 1925, and renewed July 9, 1925 (note dated July 3, 1925), for \$3,900, there having been a payment of \$100 made on it at that date." The following payments were made on this note: July 9, 1925, \$339.09; July 11, 1925, \$300; July 13, 1925, \$450; July 14, 1925, \$200 and \$150, and July 18, 1925, \$179.33, leaving a balance due August 3, 1925, of \$2281.58.

On December 22, 1924, Joseph A. Mudd, one of the defendants in the present suit, and the sole defendant in the second suit heretofore referred to, executed the following instrument:

West Madison State Bank,
4011 W. Madison St.,
Chicago, Illinois.

For value received, the undersigned and each of the undersigned, hereby become a party to, adopt, agree to, accept, guarantee and assume all the terms, conditions contained in the note or notes signed by the Chicago Motor Sales Company, by Frank X. Mudd, Jr.,

and Ray Lancaster and by them endorsed up to \$5,000.00.

We hereby guarantee the payment of said note at maturity and consent without notice of any kind to any and all extensions of time made by the holder of said note or notes.

(Signed) Jos. A. Mudd"

In the second suit the plaintiff sued to recover from Joseph A. Mudd, under this last guaranty, payment of the balance due on the \$3,900 note.

On December 10, 1923, the Sales Company executed a note for \$1,000, payable to the plaintiff. On March 14, 1924, this note was past due and according to the testimony of the plaintiff "it may have been that the old note was marked paid and cancelled and the makers signed a new note, * * * This note made December 10, 1923, paid March 14, 1926 (correct date, March 14, 1924), and on March 14, 1926, there is a new note made for the same amount." "That note was paid on June 12th and a new note made on the 14th. There was money on hand in the (plaintiff) bank to pay it. On September 12, 1924, they let the note run past due, and it was paid on the 16th and a new note made out the same date. There was money on hand (on deposit in the plaintiff bank) on the 16th to pay it. The note came due December 11th, and was paid December 13th, and a new note made out on the 16th. There was money on hand (on deposit in the plaintiff bank) December 13th to pay it. That note came due on March 16th, and was paid and a new note made out the same day. * * * The note was paid May 16, 1925, * * * was marked paid and a new note given. * * * That \$1,000 is still outstanding." This last note is one of the items claimed in the declaration in the instant suit.

On December 22, 1924, the Sales Company executed its promissory note for \$3000, payable to the plaintiff. This note matured March 23, 1925, "on which date note was cancelled and a new note given." The balance of the Sales Company (on deposit

with the plaintiff) on that date was \$10,003.19. The last note matured May 22, 1925, on which date it was cancelled and a new note given for the same amount. This note was not paid and it is one of the items that the plaintiff claims in its declaration in the instant suit.

On December 29, 1924, the Sales Company executed its promissory note for \$2,000, payable to the plaintiff. This note matured March 30, 1925. On March 31 the old note was marked paid and a new one for the same amount issued. The balance of the Sales Company in the plaintiff bank on that date was \$4966.17. The note of March 31 matured May 29, 1925. Prior to that time various payments had been made on the note and on the last mentioned date there was due on the same \$1,200, and a new note for that amount was then executed by the Sales Company. This note matured July 28, 1925, and has not been paid, and it is one of the items the plaintiff sues for in the instant suit.

It will be noted that the plaintiff in the present proceeding is not suing to recover upon the two notes that were in existence on November 1, 1923, nor upon any "renewals" of the same, and that the three notes that form the basis of the claim in the instant case are not in any way connected with the two notes that were in existence on November 1, 1923. The original notes, of which the said three notes are alleged renewals, were all executed after the date of the guaranty and they were given in payment of loans made by the plaintiff to the Sales Company after November 1, 1923.

In the instant case the defendants contend (inter alia) that the instrument of November 1, 1923, does not guarantee the payment of any of the three notes that make up the claim of the plaintiff in the declaration. The plaintiff contends that the guaranty in question cannot be limited to notes signed and executed

also the plaintiff) on May 15, 1911, and the last note
dated May 15, 1911, on which date it was cancelled and a new
note given for the same amount. This note was not paid and it is
one of the issues that the plaintiff claims in the declaration is
the instant suit.

On November 15, 1911, the other company received the
promissory note for \$2,000, payable to the plaintiff. This note
dated March 15, 1911, on which it was not paid and a new note was
given and a new one for the same amount issued. The plaintiff claims
that the note in the declaration was not paid and it is one of the
issues that the plaintiff claims in the declaration. The note of March 15, 1911, dated in the same
various payments had been made on the note and on the last payment
made there was due on the note \$2,000, and a new note for that amount
was then issued by the other company. This note was not paid and
it is one of the issues that the plaintiff claims in the declaration. And it is one of the issues that the plaintiff
claims in the instant suit.

It will be noted that the plaintiff in the present declara-
tion is not going to recover upon the two notes that were in dispute
on November 15, 1911, but upon the "promissory" of the note, and that
the other notes were taken the basis of the claim in the instant case
and not in any way connected with the two notes that were in dispute
on November 15, 1911. The original notes, it is said, were
given and alleged payments, were all cancelled after the date of the
renewal and they were given in payment of loans made by the plaintiff
to the other company after November 15, 1911.

On the instant case the defendant claims (first claim)
that the instrument of November 15, 1911, was not renewed and
payment at one of the three dates that were on the claim of the
plaintiff in the declaration. The plaintiff contends that the
payment in question cannot be limited to notes signed and cancelled

prior to the date of the instrument, and that it must be held that the guaranty covers, by its terms, the said three notes.

The law is well settled that the undertaking of a guarantor is to be strictly construed and his liability is not to be extended by construction. (Phoenix Mfg. Co. v. Hogardus, 231 Ill. 528, 531; Tolman Co. v. Rice, 164 Ill. 255, 258-9; Heberling M. & E. Co. v. Smith et al., 201 Ill. App. 126, 130-1; Harman Co. v. Knator, 202 Ill. App. 9. Many other cases to the same effect might be cited.)

In support of its present contention the plaintiff cites the following cases: First National Bank v. Wunderlich, 145 Wis. 193; Sherburne v. Butler Paper Company, 40 Ill. App. 383; Peoria Savings, Loan & Trust Co. v. Elder, 165 Ill. 55; National Bank v. Thomas, 220 Pa. St. Rep. 360; Hartwell & Richards Co. v. Boss, 22 N. I. 583; and Fausseg v. Reid, 145 Ill. 488.

In our opinion none of these cases aids the plaintiff in its present contention for the reason that in each of these cases the contract clearly contemplates a future course of dealing or a succession of credits to be given.

In Ryan v. Trustees of Shawneetown et al., 14 Ill. 20, 24, it is said: "Guarantors and sureties are not to be made liable beyond the express terms of their engagements. They have a right to prescribe the terms and conditions upon which they will assume a responsibility; and no person has the right to change those terms. * * * We cannot enforce terms which the parties have not stipulated to fulfill."

In our judgment the guaranty in question is neither ambiguous nor doubtful in meaning. In plain language it states that the defendants "agree to, accept, guarantee and assume all the terms, conditions contained in the note or notes signed." This language clearly refers to a note or notes in existence at the time of the

signing of the instrument. The plaintiff is a bank and accustomed to transactions of this character. It furnished the form of the guaranty, and if the understanding between it and the defendants was what it now claims, it would doubtless have provided in the guaranty, by apt and plain language, the provision that the defendants guaranteed and assumed all the terms and conditions to be provided or imposed in any note or notes to be signed at some future date by the Sales Company. The law is plain that the liability of guarantors cannot be enlarged or extended by implication or judicial construction. The plaintiff argues that as the total amount of the two notes in existence at the time of the signing of the instrument was only \$4,000, the words "up to \$5000.00" show that the guarantors intended to guarantee the payment of notes not in existence at the time of the signing of the instrument. There is no merit in this argument. It is certain that the guarantors limited their liability to \$5,000, and as the guaranty provided that the guarantors consented "to any and all extensions of time made by the holder of said note or notes," the interest that might thereby become due on the notes, together with the principal of the two notes, \$4000, might make an amount in excess of \$5000 and the words "up to \$5,000.00" were apparently placed in the instrument to guard against such a contingency and to limit the total liability of the guarantors, in any event, to \$5000. After a very careful consideration of the instant question, we have reached the conclusion that the guaranty in the present case did not, as a matter of law, guarantee the payment of any of the three notes sued upon in the declaration of the plaintiff.

The defendants have raised two other contentions that we believe to be meritorious, but in the view that we have taken of this appeal we do not deem it necessary to here give our reasons for so

signing of the instrument. The liability is a joint and several
 to enforcement of the instrument. It is provided in the terms of the
 instrument, and it is understood between it and the instrument was
 when it was signed, it is provided that the instrument was provided in the instrument,
 by the said parties, and provided that the instrument was provided in the instrument,
 and assumed all the terms and conditions as provided in the instrument,
 in any case or matter as to which it is provided in the instrument,
 Company. The law is plain that the liability of the instrument is joint
 to enforce or enforce by implication or implied consideration.
 The liability is joint and several as to the instrument of the two parties in
 existence at the time of the signing of the instrument was only \$4,000,
 the words "up to \$4,000" and the instrument is provided in
 provided the payment of notes and is provided in the terms of the
 signing of the instrument. There is no doubt in this regard. It
 is certain that the instrument is provided in the instrument, and
 as the instrument provided that the instrument was provided "as and for all
 extensions of time made by the holder of said note or notes," the
 instrument is provided that the instrument is provided in the instrument,
 principal of the two notes, \$4,000, which was an amount in excess
 at \$4,000 and the words "up to \$4,000" were specifically placed in
 the instrument as to the instrument, and is provided in the instrument,
 the joint liability of the instrument, in any event, to \$4,000. It is
 a very careful consideration of the instrument, and it is provided in the instrument,
 the instrument is provided that the instrument is provided in the instrument,
 matter of law, however, the payment of any of the notes after that
 upon to the execution of the instrument.
 The instrument was signed by the parties and it is provided in the instrument,
 believe to be sufficient, but in the event it is provided in the instrument,
 appear to be sufficient in the instrument, in the event it is provided in the instrument,

holding. Moreover, like contentions are raised by the defendant in West Madison State Bank v. Joseph L. Mudd (Gen. No. 32373), and in the opinion this day filed in that case we have passed upon the same and given our reasons for our holdings.

The judgment of the Superior Court of Cook County is reversed.

REVERSED.

Gridley, P. J., and Barnes, J., concur.

PAULINA WORKEVICH, administratrix
of the estate of Mike Workevich,
deceased,

Appellee,

v.

THE ATCHISON, TOPEKA and SANTA FE
RAILWAY COMPANY, a corporation,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, in an action in case, Paulina Workevich, administratrix of the estate of Mike Workevich, deceased, plaintiff, sued The Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant. The case was tried before the court with a jury and there was a verdict returned finding the defendant guilty and assessing the damages of the plaintiff at the sum of \$17,250. Judgment was entered on the verdict and this appeal followed.

The suit was brought under the Federal Employers' Liability Act to recover damages for the death of Mike Workevich.

There is no conflict in the testimony as to the following facts: Plaintiff's intestate, Mike Workevich, commonly called Mike Burke, was working for the defendant company as an air brake inspector in its Corwith yards in the city of Chicago. The tracks in the yards run north and south, and the yard extends from 38th street on the north to 47th street on the south. The injuries occurred at the north end of the yard. On the night in question a train consisting of 52 cars was made up in the yard on track No. 13, which ends approximately at 39th street, where it converges into track 14. The head end of the

Noting, however, the correspondence and notice by the respondent
in the United States, dated 1904, 1905, 1906, 1907, 1908, 1909, 1910, and
in the opinion that the respondent has been treated fairly and
that the respondent has been treated fairly and
The respondent of the respondent of the respondent is

TESTED.

CHIEF, U. S. AND FOREIGN, U. S. DEPARTMENT.

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32440

PAULINA NORKEVICH, administratrix
of the estate of Mike Norkevich,
deceased,

Appellee,

v.

THE ATCHISON, TOPEKA and SANTA FE
RAILWAY COMPANY, a corporation,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE SWANLAN DELIVERED THE OPINION OF THE COURT.

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There is no conflict in the testimony as to the following facts: Plaintiff's intestate, Mike Norkevich, commonly called Mike Burke, was working for the defendant company as an air brake inspector in its Corwith yards in the city of Chicago. The tracks in the yards run north and south, and the yard extends from 38th street on the north to 47th street on the south. The injuries occurred at the north end of the yard. On the night in question a train consisting of 52 cars was made up in the yard on track No. 13, which ends approximately at 39th street, where it converges into track 14. The head end of the

train on track 13 was standing at about 39th street or a little south thereof. The course of the train was northward and it was destined beyond the state. About a block north of 38th street, the Chicago & Alton Railroad crosses the main line of the defendant and there is an interlocking plant at that point. A signal light or target governs the operation of trains out of the yard and over this "crossover." There were two movements of the train in question after the engine was attached. The first was a short one, varying, under the evidence, from one to eight car lengths. The signal lights ahead were favorable when the train made the first start. Very shortly after the train stopped after the first movement the signal at the crossing of the Chicago & Alton Railroad was turned against it, and it was therefore necessary for the train to remain at a standstill about ten minutes and until the engineer got the target or signal that allowed him to move forward. The train started forward the second time about 9:10 p. m. and then continued without interruption on its run out of Chicago. There were no eyewitnesses to the accident. Shortly after the train had left the yard the deceased was found between tracks 13 and 14 with his left leg cut off. The body was clear of both tracks and the feet pointed towards track 13 and the head towards track 14. The lantern and wrench of the deceased were lying on the ground near him. Blood and small pieces of flesh were on the inside and outside of the rail of track 13 and on the ground on each side of the rail near where the deceased was lying. The point where he was found was approximately thirteen to fifteen car lengths from the place where the head end of the train stood just before it first moved. It is conceded that the deceased died from the injuries he received.

train on track 12 was standing at about 10:20 when it was
 about 10:20. The engine of the train was westward and it was
 standing beyond the signal, about a block north of the signal. The
 engine's light reflected across the main line of the railroad and
 there is an interesting story in that light. A signal light of
 largest power in the country is visible out of the back and from 10:20
 "however". There were two movements of the train in question
 after the engine was stopped. The first was a short stop, starting
 when the engine, then was in sight and standing. The signal
 light about 10:20 was visible when the train made the first stop.
 Very shortly after the train started after the first movement the
 signal at the crossing of the railroad & 10:20 reflected on a house
 again (1), and it was standing westward of the train in a house
 as a signal light about 10:20 minutes and until the engine got the
 signal at 10:20 and started out to go to the west. The train started
 toward the west from about 10:20 p. m. and from 10:20 minutes
 information on the way out of the house. There were no other
 in the vicinity. Shortly after the train had left the house the
 distance was about 10:20 minutes and it was in sight and was still
 the light was about 10:20 minutes and the light was about 10:20
 it was the house towards 10:20. The light was about 10:20
 houses were lying on the ground near him. When the light was
 of light was on the inside and outside of the wall at 10:20
 and on the ground on each side of the wall about 10:20 minutes
 was lying. The light was on the house and was standing within
 to reflect on the ground from the light about 10:20 p. m.
 light about 10:20 minutes. It is possible that the
 distance was from the distance in question.

A number of contentions are raised by the defendant, but in the view that we have taken of this appeal it will be necessary for us to consider only one, namely, that the verdict is against the manifest weight of the evidence.

The plaintiff contends that the proof shows that the defendant was negligent in the operation of the train when it moved forward the first time, and a considerable portion of her brief is devoted to the argument in support of this contention. The defendant, while it insists that the greater weight of the evidence supports its theory that there was no negligence in the management and operation of the train at the time it was first started, also strenuously contends that it is entirely immaterial whether there was negligence or not in the operation of the train when it first started, for the reason that it is impossible to arrive at any other conclusion from the proof than that the deceased was injured as a result of the second movement of the train.

Campbell, the conductor of the train in question, testified that after the train came to a stop after the first movement, he started to walk towards the rear end of the train and that on the way he met the deceased, who was walking towards the head end of the train, and that he (Campbell) questioned the latter as to why he had applied the air brakes and stopped the train. Wilk, a witness for the plaintiff, testified that after the train had stopped after the first start he saw the deceased walking towards the front end of the train. There was no evidence for either side that directly rebutted, in any way, this testimony of these two witnesses, and none of the circumstances in evidence is inconsistent with the defendant's theory of fact that the deceased was not injured by the first starting of

A number of conditions are listed by the witnesses, but

in the view that no more cases of this kind is still in progress

for me to consider only one, namely, that the witness is injured

the material which is the evidence.

The following conditions are listed by the witnesses, but

not was satisfied in the opinion of the jury that it was necessary

the first time, and a considerable portion of the time in the

to the witness in regard to the condition. The witness, who

is liable that the greater weight of the evidence supports the

theory that there was no negligence in the management and operation

of the train at the time it was first started, also affirmatively

shows that it is entirely immaterial whether there was negligence or

not in the operation of the train when it first started, for the

reason that it is impossible to arrive at any other conclusion from

the facts that the witness was injured as a result of the

action movement of the train.

Consequently, the condition of the train is satisfied, provided

that after the train came to a stop after the first movement, the

engineer in vain towards the rear end of the train and that on the way

he was the engineer, and was walking towards the rear end of the

train, and that he (Connelly) afterwards saw faster as he ran to the

engineer the car behind and stopped the train. With a witness for

the plaintiff, testified that after the train had stopped after the

first start he saw the engineer walking towards the front end of the

train. There was no witness for either side who directly contradicted

in any way, this testimony of these two witnesses, and none of the

circumstances is evidence in favor of the defendant's theory

of fact that the defendant was not injured by the first starting of

the train. In this state of the record it becomes an immaterial question whether the defendant was negligent or not in the operation of the train in the first movement of the same .

The defendant insists that the record in the case clearly shows that the case was tried by the plaintiff on the sole theory that the deceased was injured by the first movement of the train, and it calls attention to the fact that the trial court instructed the jury to find the defendant not guilty if they believed from the evidence that the deceased was injured only as a result of the second movement of the train, and the defendant further insists that the court gave this instruction on the assumption that the theory of the plaintiff was that the deceased was injured only as a result of the first movement of the train. The defendant further contends that, in any event, the evidence does not warrant a finding that the defendant was guilty of any negligence in the second movement of the train. The plaintiff contends that the defendant "started the second time without sounding the whistle and without the engineer knowing why the air had been applied at the rear of his train. Either of these acts proves negligence, which justifies recovery."

Peter Ongyak was an air brake inspector of the train in question and it was his duty to make an inspection of the brakes at the front end of the train. The deceased was the air brake inspector at the rear end of the train. The only evidence tending to show that the train was started the second time without the whistle being sounded was that given by Ongyak. Ongyak testified that the engineer blew the whistle three times before the train started the first time; that after he blew the whistle "he got the target and then he moved;" that after the train stopped the engineer

the train. In this case it is shown as impossible
 question whether the defendant was negligent or not in the operation
 of the train in the first movement of the train.

The defendant claims that in regard to the train
 above that the train was not under the plaintiff's control and
 that the defendant was injured by the first movement of the train, and
 it is also admitted in the first case that the defendant was injured by
 the first movement of the train, and the defendant claims that the
 jury to find the defendant and guilty of being negligent from the
 defendant the defendant was injured only as a result of the
 movement of the train, and the defendant claims that the
 court gave this instruction on the assumption that the injury to
 the plaintiff was that the defendant was injured only as a result of
 the first movement of the train. The defendant further claims
 that, in any event, the defendant was not negligent in the
 first movement of the train, and the defendant claims that the
 defendant was guilty of being negligent in the second movement of
 the train. The plaintiff contends that the defendant was
 second time negligent in the first movement of the train, and
 moving the train and the first movement of the train, and
 of these facts proves negligence, which justifies recovery.

The defendant claims that the first movement of the train in
 question was not negligent, but was negligent in the second
 of the first movement of the train. The defendant claims that the
 instruction on the first movement of the train. The only evidence tending
 to show that the train was negligent in the first movement of the
 train being negligent and that given by the plaintiff. The plaintiff
 that the defendant was negligent in the first movement of the train
 of the first movement of the train, and the defendant claims that the
 injury and then he moves, that the train stopped the defendant

"never blew any more after that," but "he got the target and got the lights from the switch tender."

The theory of the plaintiff that the defendant was guilty of negligence in the first movement of the train was based practically on the testimony of Ongyak. It appeared that the rules and customs of the defendant in force at the time of the accident provided that when a train was made up and the road engine attached, the engineer should not move the train while a blue light was attached to the locomotive nor until he received a clearance card from the head air brake inspector. Ongyak, on the trial, testified that the first movement of the train was made before the blue light was removed from the locomotive and before he gave a clearance card to the engineer. This testimony was not only strongly rebutted by evidence given by witnesses for the defendant, but it further appeared that Ongyak, when he testified at the coroner's inquest at the time of the death of Norkevich, stated that before the train started on the first occasion he had taken the blue light off the engine and had given a clearance card to the engineer and that "everything was then O. K." As bearing on the question as to whether or not the whistle was sounded before the second start, it further appears conclusively from the evidence that a signal light or target governs the operation of trains out of the yard and over the "crossover" where the Chicago & Alton Railroad crosses the main line of the defendant, and that before the engineer could secure the light or target in his favor it would be necessary for him to blow his whistle three times. That he was given the light in his favor about ten minutes after the train first stopped and that the train thereupon proceeded on its journey, without interruption, is not disputed. The defendant introduced evidence to the effect that the engineer sounded the whistle just before the train made the second start and one of the

witnesses for the defendant testified that the engineer whistled for the light in his favor before the second start, and although several other witnesses who testified for the defendant were on the ground at the time of the accident none of these gave testimony in support of this particular evidence given by Ongyak. In our judgment it is clear from the facts and circumstances in proof that the engineer sounded the whistle just before the second start of the train.

The plaintiff insists that it was negligence for the engineer to start the train without first finding out why the air had been applied at the rear of the train. It is conceded that approximately ten minutes elapsed between the first stop of the train and the second starting. The engineer testified that the brakes were all right when he started the train the second time and that the train would not move if they were not. The conductor of the train testified that when he met the deceased after the train stopped the first time he inquired of the deceased as to what was the trouble, and that the latter said that the air was not coupled on the way car when he applied the air but that everything was then all right, and that he (the conductor) then saw the deceased give a signal with his lantern. It is undisputed that the train, after the second start, moved out of the yard without any trouble or interruption. This, under the evidence, it could not do if the air was still applied. We find no warrant in the proof for the contention that the engineer had any reason to believe that the air brake trouble had not been remedied when the train was started the second time.

After a very careful consideration of the record in this case, we are satisfied that the verdict is clearly against the manifest weight of the evidence. The judgment of the Superior Court of Cook County is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

Witnesses for the defendant testified that the engine started for the light in the house before the second shot, and although several other witnesses who testified for the defense were on the ground at the time of the defendant's second shot, they were not asked to give this particular testimony. It was believed that the engine started from the first and subsequent shots was not the engine which started the bullet before the second shot of the bullet.

The plaintiff insists that it was negligence for the engineer to start the train without first checking and seeing the red flag applied at the rear of the train. It is contended that approximately two minutes elapsed between the first stop of the train and the second starting. The engineer testified that the second start was made when he started the train the second time and that the train was not in it they were not. The movement of the train testified that when it met the second after the train stopped the first time he thought it was the second as it went was the second, and the latter will testify the air was not coupled on the way and was not applied for air but that everything was then all right, and that he, the defendant, knew now the defendant gave a signal with his lantern. It is contended that the train, after the second start, went out of the yard without any trouble or interruption. This, under the evidence, is easily not so it was all right again. He finds no evidence in the facts for the contention that the engineer had any reason to believe that the air brake would not have functioned when the train was started the

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CATHERINE L. STOLL,
Plaintiff in Error.

v.

C. W. HANFORD, M. D.,
Defendant in Error.

ERROR TO SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, in an action in case, Catherine L. Stoll, plaintiff, sued C. W. Hanford, M. D., defendant, for alleged malpractice. The defendant filed general and special demurrers to the original declaration, and thereafter the plaintiff, by leave of court, filed an amended declaration. To the amended declaration the defendant filed seven pleas: the general issue and six special pleas, the fifth, sixth and seventh being pleas of the Statute of Limitations. The plaintiff filed a similiter to the first, second, third and fourth pleas, and replications to the fifth, sixth and seventh pleas. The defendant filed a demurrer as to all of the replications. It was overruled as to the replications to the fifth and sixth pleas and sustained as to the replication to the seventh plea. The plaintiff elected to stand by her replication to the seventh plea, and thereupon the trial court entered a judgment of nisi against the plaintiff and in favor of the defendant for costs. The plaintiff has prosecuted this writ of error.

The alleged malpractice occurred in the latter part of 1921 and the early part of 1922, and when the amended declaration was filed - April 24, 1925 - the Statute of Limitations had run. The replication of the plaintiff to the seventh plea was as follows:

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2201

STATE OF NEW YORK
COUNTY OF NEW YORK

JOHN A. WILSON,
Plaintiff in Error,
v.
J. W. HARTMAN, et al.,
Defendants in Error.

MR. JUSTICE WILSON delivered the opinion of the court.

In the second term of such court, in an action on
error, defendant in error, plaintiff in error, et al.,
defendant, vs. plaintiff in error, et al., defendant,
and several intervenors to the original action, an order
of the court, by leave of court, filed on motion of
the several intervenors and defendant in error, and
general issue and the several pleas, the fifth, sixth and seventh
being pleas of the defense of limitation. The plaintiff filed
a reply to the third, fourth, sixth and seventh pleas, and
replication to the fifth, sixth and seventh pleas. The defendant
filed a demurrer to all of the replications. It was ordered
as to the replication to the fifth and sixth pleas and sustained
as to the replication to the seventh plea. The plaintiff pleaded
so stand by her replication to the seventh plea, and thereupon the
trial court entered a judgment of affirmance against the plaintiff
and in favor of the defendant for costs. The plaintiff has
presented this writ of error.

The alleged negligence occurred in the latter part of
1901 and the early part of 1902, and was the alleged negligence
was filed - April 14, 1903 - the statute of limitation has run.
The replication of the plaintiff to the seventh plea was as follows:

"And the plaintiff as to the plea of the defendant by him seventhly above pleaded says that she, the plaintiff by reason of anything in that plea alleged, ought not to be barred from having her aforesaid action in said amended declaration and each count thereof, because she says that the several causes of action and each and every of them did accrue to her within two years next before the commencement of this suit wherein as above in her original declaration of which the amended is a restatement, in manner and form as she has above complained against the defendant: And this defendant prays may be inquired of by the country, etc."

Plaintiff contends that the original declaration stated a cause of action and that the trial court erred in sustaining the demurrer of the defendant to the plaintiff's replication to the seventh plea, and that the plaintiff by electing to stand by her demurrer challenged the correctness of the trial court's ruling in that regard. The plaintiff further contends, first, that in an action for negligence a cause of action may be stated without an averment of due care on the part of the plaintiff, and, second, that even if it be held that it is essential in the present action that the original declaration allege that the plaintiff was in the exercise of due care, etc., still, there are certain facts alleged in one of the counts of the original declaration from which it may, by fair and reasonable intendment, be implied that the plaintiff was in the exercise of due care.

As to the first contention: In Walters v. City of Ottawa, 240 Ill. 259, the Supreme Court, after reviewing many prior decisions, lays down the rule as follows (p. 266):

"A declaration in an action to recover for injuries received through negligence which does not aver due care on the part of the plaintiff when he was injured, and does not contain any averment in regard to his conduct or the circumstances surrounding him from which due care on his part may be reasonably inferred, does not state a cause of action." (See also Cada v. The Fair, 137 Ill. App. 111, 113, and cases cited therein.)

It has been specifically held that the aforesaid rule applies to cases where physicians and surgeons are sued for alleged malpractice. (See

Wesley v. Allen, 235 Ill. App. 322, 325; Peters v. Howard, 206 Ill. App. 610, 617-8.) If it were necessary, decisions of sister states to the same effect might be cited.

As to the second contention: The plaintiff concedes that in none of the counts of the original declaration was there an averment that plaintiff was in the exercise of ordinary care, but she contends that certain averments in the second count of that declaration, by fair and reasonable intendment, are sufficient to imply that the plaintiff was in the exercise of ordinary care. This count alleges that the defendant held himself out to the public as a Radium specialist and that on "October 27, A. D. 1921, plaintiff was suffering from pain in the face, and that defendant, for hire and reward as such physician and surgeon, undertook to treat the plaintiff for such ailments and pains from which she was then suffering; that he caused an X-ray to be taken of plaintiff's head and face; that he then diagnosed that plaintiff was afflicted with cancer that was well hidden from sight, was seated forward on the right side of plaintiff's face, and the defendant then and there represented himself to be a 'Radium' specialist, and plaintiff, believing such representations made by the defendant, submitted herself to such treatment for the said supposed cancer so represented by the defendant," etc. (Italics ours.) The plaintiff relies on the italicized portion of the above quotation to sustain her present contention, and argues that "when she alleges she submitted herself to treatments of her physician and was injured she, in effect, alleges she, on her part, was using due care. Is not that the fair and reasonable intendment of that averment?" After a very careful consideration of the instant contention, we have reached the conclusion that it is without merit. The averment that the plaintiff relied on the representations of the

defendant as to his skill and that she submitted to the treatment for the supposed cancer, cannot, in our judgment, be interpreted as an allegation of conduct on the part of the plaintiff from which by fair and reasonable intendment it would be sufficient to imply that plaintiff at the time of the alleged treatment was in the exercise of ordinary care. A patient may believe the representations of a physician and may submit to treatment by him, and yet, nevertheless, be guilty of negligence in and about such treatment.

"If a patient is guilty of negligence which is an active and efficient contributing cause of the injury occasioned by the malpractice of his physician he is not entitled to recover. In other words, contributory negligence simultaneous and co-operating with the fault of the physician and entering into creation of the cause of action and forming an element in the transaction which constitutes the cause of action will bar a recovery. 21 R. C. L. 402; Fauers v. Smith, 49 Wash. 557, 17 L. R. A. (N. S.) 1242, and note. For instance, if a surgeon is prevented from reducing a dislocation by the refusal of his patient to submit to an operation the surgeon cannot be held liable for damages resulting therefrom. Littlejohn v. Arbogast, 25 Ill. App. 605." (Wesley v. Allen, supra, p. 324.)

When the count in the original declaration that is relied upon by the plaintiff to sustain her present contention is tested by the rules of law that govern the question involved, it would seem plain that it does not state a cause of action.

For the reasons stated, the trial court did not err in sustaining the demurrer of the defendant to the replication of the plaintiff to the seventh plea, and the judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

32626

250 I.A. 637³

JOSEPH H. BOS,
Appellee,

v.

ADVERTISERS ILLUSTRATING
COMPANY, a corporation,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, in an action of assumpsit, Joseph H. Bos, plaintiff, sued Advertisers Illustrating Company, a corporation, defendant. There was a trial before the court with a jury, and a verdict was returned finding the issues for the plaintiff and assessing his damages at the sum of \$2100. Judgment was entered on the verdict and this appeal followed.

The declaration charges a breach of a certain written contract of employment, dated September 9, 1924, whereby the plaintiff became an employee of the defendant in the capacity of a commercial artist, for a period of two years, beginning October 1, 1924, at a salary of \$90 per week for the first year, and \$100 per week for the second year. The declaration further alleges that pursuant to the contract the plaintiff became an employee of the defendant October 1, 1924, and continued in its service as a commercial artist until May 19, 1926, at which time the defendant discharged the plaintiff from its service; that the plaintiff has always since been ready and willing to continue in the service and employ of the defendant, and has offered to so continue, but that the defendant has omitted and refused to further employ the plaintiff

2501A.687

Page 2

JOSEPH H. HAY,
Plaintiff.

JOSEPH H. HAY,
Plaintiff.
JOSEPH H. HAY,
Plaintiff.
JOSEPH H. HAY,
Plaintiff.

MR. JUSTICE ROBERTS delivered the opinion of the court.

In the Report Book of each County, in the State of
Massachusetts, Joseph H. Hay, Plaintiff, was appointed
Comptroller, a corporation, defendant. There was a trial before the
court with a jury, and a verdict was returned finding the plaintiff
for the plaintiff and assessing his damages at the sum of \$1000.
The court was asked to set aside the verdict and this appeal followed.
The defendant assigns as grounds of a reversal of the

verdict of damages, that defendant, at the time, during the
plaintiff's term as comptroller of the defendant in the capacity of a
commercial entity, for a period of two years, beginning October 1,
1904, at a salary of \$50 per week for the first year, and \$100 per
week for the second year. The defendant further assigns that
prior to the contract the plaintiff received an assignment of the
defendant's interest in the business in the amount of \$1000.
commercial entity until July 1, 1905, at which time the defendant
discharged the plaintiff from his services; that the plaintiff was
always ready and willing to continue in the service and
employment of the defendant, and was offered to be reinstated, but that
the defendant has refused and refused to further employ the plaintiff.

under the terms of the contract, and has refused to pay him any of the sums to which he was then and there entitled under the terms of the contract; that the plaintiff has thereby lost and been deprived of all the wages, profits and benefits which he otherwise might and would have derived from being continued in the service of the defendant, to the damage of the plaintiff in the sum of \$3000. The affidavit of claim alleges that the amount due the plaintiff was \$2100.

The defendant has assigned and argued many alleged grounds for a new trial. In the view that we have taken of this case, it will be necessary to refer to only one.

The plaintiff, in his affidavit of claim, alleged that the total amount due him under the contract was \$2100. The jury awarded this amount, which represented in full the sum of money which the plaintiff would have earned under the contract during the period of time intervening between the date of his discharge and the date of the expiration of the contract. The defendant complains of the following instruction, given at the instance of the plaintiff:

"2. The court instructs the jury that if you find for the plaintiff, the measure of damages for the breach of contract is that sum of money which plaintiff would have earned during the period of time intervening between the date of discharge and the date of the expiration of the contract at the rate of payment fixed by the terms of the contract."

The plaintiff defends this instruction on the ground that "the burden of proving mitigation of damages in an action for breach of contract is upon the defendant, and the defendant must affirmatively show that the plaintiff earned or by reasonable diligence might have earned wages in some other employment," and that the defendant failed to offer competent evidence tending to

under the terms of the contract, and has refused to pay him any
of the sum to which he was then and there entitled under the
terms of the contract. That the plaintiff was throughly led and
been deceived of all the money, goods and chattels which he
observed might and would have received from defendant in the
exercise of the defendant, in the course of the plaintiff in the
sum of \$5000. The plaintiff of claim alleges that the amount was
the plaintiff and wife.

The defendant has assigned and agreed to pay many alleged
grounds for a new trial. In the year 1881 he gave bond of \$1000
and, it will be necessary to refer to only one.

The plaintiff, in his affidavit of claim, alleged that
the total amount due him under the contract was \$1000. The jury
returned this amount, which was returned in 1881. The sum of money
which the plaintiff would have received under the contract would
the period of time intervening between the date of his trial and
and the date of the expiration of the contract. The defendant
complaint of the following particulars, given as the basis of

the plaintiff:

"1. The agent defendant has been paid by you
that for the plaintiff, the amount of money for
the purpose of contract is that sum of money which
plaintiff would have received under the terms of the
contracting between the date of his trial and the date
of the expiration of the contract of the sum of \$1000.
must have been the terms of the contract."

The plaintiff contends this instruction on the ground that "the
burden of proving willful neglect of defendant is on plaintiff for breach
of contract is upon the defendant, and the defendant must

affirmatively show that the plaintiff acted or by reasonable
diligence might have secured money in some other employment," and
that the defendant failed to offer competent witnesses tending to

show that the plaintiff earned, or by reasonable diligence might have earned wages in some other employment, and that therefore the instruction states a correct rule of law as applicable to the facts of the case. Conceding that the plaintiff's statement of the law is correct, we cannot agree with him as to the effect of the evidence. The defendant introduced evidence that tended to prove that a person in the trade or calling of the plaintiff, by the use of reasonable diligence might have secured employment in the same line between May 15, 1926, and October 1, 1926. The plaintiff, during the trial, apparently appreciated the effect of this evidence, for he placed on the stand, in rebuttal, a witness who testified that the condition of business in the trade or occupation of the plaintiff during the period in question was not good. It is a significant fact in this case that the plaintiff did not testify as to what he did with his time from May 19, 1926, to October 1, 1926, nor as to what, if any, opportunities he had for employment in his line of work during that period. His failure to testify in reference to this matter tended to strengthen the evidence of the defendant in that regard. It is, of course, fundamental law that the plaintiff could not lie idle during the period in question if he had an opportunity to get work in his trade or occupation. The law will not permit him to arbitrarily so conduct himself as to aggravate the damages. We hold that in the present case, under the evidence, there was an issue of fact as to whether the plaintiff, by reasonable diligence, might have earned wages between May 19, 1926, and October 1, 1926, in his particular trade or occupation, and that therefore the court erred in giving to the jury the instruction in question.

know that the plaintiff earned, or by reasonable inference might have earned wages in some other employment, and that therefore the defendant introduced a contract of law as evidence to the facts of the case. Concerning that the plaintiff's statement of law is correct, we cannot give him as to the effect of the evidence. The defendant introduced evidence that tended to prove that a person in the trade or calling of the plaintiff, by the use of reasonable diligence might have secured employment in the same line between May 13, 1933, and October 1, 1933. The plaintiff, during the trial, repeatedly requested the return of this evidence, but he failed on the ground that it was a privilege who testified that the production of evidence in the form of cooperation of the plaintiff during the period in question was not good. It is a stipulation that in this case that the plaintiff did not testify as to what he did during the time from May 13, 1933, to October 1, 1933, nor as to what, if any, opportunities he had for employment in his line of work during that period. The failure to testify in reference to this matter tended to strengthen the evidence of the defendant in that regard. It is, of course, immaterial law that the plaintiff could not find his living the period in question if he had an opportunity to get work in the trade or occupation. The law will permit him to testify as to what himself he is engaged in the business. We hold that in the present case, under the evidence, there was an issue of fact as to whether the plaintiff, by reasonable diligence, might have secured wages between May 13, 1933, and October 1, 1933, in his particular trade or occupation, and that therefore the court erred in giving to the jury the instruction in question.

Several, at least, of the other grounds assigned and argued by the defendant are meritorious, but as the errors involved are not apt to arise upon another trial of the case, we do not deem it necessary to specially refer to the same.

The judgment of the Superior Court of Cook County is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley, F. J., and Barnes, J., concur.

32660

250 I.A. 637

STEPHEN MADAY,
Plaintiff in Error.

v.

JOSEPH SIPPIL,
Defendant in Error.

ERROR TO SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, in an action in case, Stephen Maday, plaintiff, sued Joseph Sippil, defendant, to recover damages for injuries to his automobile caused by a collision between the automobile of the plaintiff and the automobile of the defendant. The case was tried before the court with a jury and there was a verdict returned finding the defendant guilty and assessing the plaintiff's damages at \$62.50. The plaintiff moved for a new trial, which was refused and judgment was entered on the verdict. The plaintiff has prosecuted this writ of error.

The plaintiff contends that the amount of the damages allowed him by the jury was entirely inadequate under the undisputed evidence in the case and after a careful examination of the record we are satisfied that this contention is a meritorious one. The proof clearly shows that the plaintiff was entitled to a verdict for five or six times the amount awarded him by the jury.

The defendant, in his brief, attempts to argue that the plaintiff was not entitled to a verdict at all and that therefore he has no right to complain of the amount of the verdict. When the verdict was returned, the defendant did not move for a new trial and he has not assigned cross-errors in this court. He is therefore in no position to argue his present contention.

The judgment of the Superior Court of Cook County is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

2201A.687

32180

CHAS. DE WILSON, JR.
DOCK COUNTY.

THOMAS KIRBY,
Defendant in error.
v.
THOMAS KIRBY,
Plaintiff in error.

MR. JUSTICE CHARLES WILLIAMS: THE CAUSE IS THE FIRST.

In the November Term of last term, an action in error, Thomas Kirby, Plaintiff, against Charles De Wilson, Jr., Defendant, was brought for damages for injuries to his automobile caused by a collision between his automobile and the automobile of the defendant. The case was tried before the court with a jury and there was a verdict returned finding the defendant guilty and assessing the plaintiff's damages at \$2,000. The plaintiff moved for a new trial, which was refused and judgment was entered on the verdict. The plaintiff has presented this writ of error.

The plaintiff contends that the amount of the damages allowed him by the jury was manifestly excessive under the circumstances in this case and asks a certain remission of the excess. We are satisfied that this contention is a well-founded one. The proof clearly shows that the plaintiff was entitled to a verdict for five or six times the amount awarded him by the jury.

The defendant, in his brief, attempts to show that the plaintiff was not entitled to a verdict of all and that therefore he has no right to complain of the amount of the verdict. When the verdict was returned, the defendant did not move for a new trial and he has not assigned error thereto in this court. He is constrained in his position to waive his present contention. The judgment of the superior court of last term is reversed and the cause is remanded for a new trial.

CHAS. DE WILSON, JR. and BARNES, J., Petitioners.

250 I.A. 637⁵

32669

JOSEPH M. HAMMER,
Appellant,

v.

ROSALIE HEINZOHN,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE SCARLAN DELIVERED THE OPINION OF THE COURT.

Joseph M. Hammer, plaintiff, sued Rosalie Heinzohn, defendant, in the Superior Court of Cook County, in an action of assumpsit. The case was tried before the court with a jury and at the close of plaintiff's evidence, on motion of the defendant, the trial court directed a verdict in favor of the defendant. Judgment was entered on the verdict and this appeal followed. The plaintiff sued to recover commissions alleged to be due him from the defendant for services rendered the latter in procuring a purchaser for certain real estate owned by her.

The plaintiff was the only witness. He offered in evidence the following instrument:

Mr. J. M. Hammer,
Room 1215, 19 So. LaSalle Street,
Chicago, Ill.

"March, 1925.

Dear Sir:

I hereby give you the exclusive right to sell my property, my two 6 flats located at 4028 to 34 Sheridan road, lot 100x197 feet, improved with 2 six flats and a two-car garage, at a price of One Hundred and Fifty Thousand Dollars (\$150,000.) I will take back a first mortgage on the north building of _____ and on the south building of _____ if you bring me a contract at this price. I am ready, able and willing to sign same and will pay you the regular Cook County Real Estate Board rate of commission, which is 3 per cent of the purchase price. Any advertising or other expense shall be borne by you in lieu of this exclusive agency. This exclusive right to sell runs for a period of ninety days from date hereof and shall be canceled

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• **THESE** **ARE** **THE** **QUESTIONS** **YOU** **WILL** **BE** **ASKED** **ON** **THE** **EXAM**

YOUNG, J. C. 1982.

... ..

Thereafter, the witness testified that he had been advised by the FBI that the defendant had been arrested in the city of New York, and that he had been taken to the Federal House of Detention in New York City. The witness testified that he had been advised by the FBI that the defendant had been arrested in the city of New York, and that he had been taken to the Federal House of Detention in New York City. The witness testified that he had been advised by the FBI that the defendant had been arrested in the city of New York, and that he had been taken to the Federal House of Detention in New York City.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

1990-1991

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1. The first of these is the fact that the
the first of these is the fact that the

[illegible]

by me in writing.

(Signed) Rosalie Heinsohn (Seal)*

The plaintiff also introduced in evidence a license issued to him by the State of Illinois on January 2, 1925; also a license issued to him by the City of Chicago on April 30, 1925. The proof shows that this license was issued some time in the morning of April 30, 1925 - "prior to the making of the contract between the defendant and her vendee." He also introduced in evidence the following instrument:

"Real Estate Board sale contract between John J. Ready, Jr., as purchaser at the price of \$149,000 of real estate known as 4028-34 Sheridan Road, and Rosalie Heinsohn as seller; \$5,000 earnest money to be paid. The contract and the earnest money to be held by The Irving State Savings Bank. Broker's commission to be paid to J. M. Hammer. Contract dated April 30, 1925.

(Signed) John J. Ready, Jr.,

By Joseph C. Cormack, His Agt.,

John J. Ready, Jr.,

Rosalie Heinsohn."

The evidence shows that this instrument was signed about 1 o'clock p.m.

The plaintiff testified that the instrument of April 30, 1925, was first signed by John J. Ready, Jr., by Joseph C. Cormack, his agent, and that at that time the original contract and a check for \$5,000 was handed to the defendant and the defendant handed them to the plaintiff and told him to have the contract placed in escrow with the Irving State Bank; that the plaintiff and the defendant went to the bank and there John J. Ready, Jr., signed the contract and it and the check were placed in escrow with that bank. The plaintiff further testified that the defendant had not paid to him the commission or any part of the same.

The plaintiff further testified that he had been in the real estate business in Chicago for many years and that at the time he received from the defendant the exclusive agency contract he did not have a city license and that he did not obtain one for the year

Do we in Chicago
(Signed) Josephine Baker (1927)

The plaintiff also testifies to receiving a letter dated 20th
by the State of Illinois on January 2, 1927, and a letter dated
to him by the Chicago Tribune on April 1, 1927. The first letter
that this letter was dated April 1st on the morning of April 1st.
1927 - "Prior to the making of the contract between the defendant
and her husband." He also introduced in evidence the following

Exhibits:

That certain books were examined between John J. Henry, Jr.,
and defendant on the 20th of April, 1927, at which time Henry
as 1927-28 Chicago Tribune, and certain books were
examined between the two parties. The books were
examined by the two parties on the 20th of April, 1927.
Henry's testimony is to the effect that he is a Chicago
Editor April 1, 1927.

(Signed) John J. Henry, Jr.,
By Joseph J. Connelley, Jr.,
John J. Henry, Jr.,
Josephine Baker.

The evidence shows that this defendant and Henry were in Chicago 2-20.

The plaintiff testified that the defendant on April 1, 1927,

was first taken by John J. Henry, Jr., to Chicago (Illinois),

and that on April 1st the defendant was taken to a hotel

for \$2.00 and was taken to the defendant and the defendant stayed there

for the plaintiff and told him to have the contract placed in evidence

with the living (John Henry) that the plaintiff and the defendant were

to the bank and John J. Henry, Jr., signed the contract and it

and the other was placed in evidence with the books. The plaintiff

further testified that the defendant had paid up on the commission

on any part of the same.

The plaintiff further testified that on May 1st in the

year certain business in Chicago for many years and that at the time

he received from the defendant the exclusive contract he did

not have a city license and that he did not believe that the book

1925 until April 30, 1925, for the reason that when he went to the city hall in January to obtain a license he found quite a number of people there seeking licenses and as he was busy he did not wait.

Article III, par. 381, of the City of Chicago Municipal Code of 1922 (in force in 1925) provides as follows: "It shall be unlawful for any person, firm or corporation to engage in the business or act in the capacity of a real estate broker as herein-after defined, within the city, without first obtaining a license therefor."

At one point in the plaintiff's reply brief it would appear that he contended that as this ordinance was not received or offered in evidence the trial court had no right to take cognizance of the same. There is no merit in this contention as the ordinance was fully pleaded by the defendant and the plaintiff in his replication conceded the existence of the ordinance and replied that he had complied with said ordinance. It was therefore properly before the trial court.

The plaintiff contends that the court erred in finding the issues for the defendant at the close of the plaintiff's case.

The defendant contends that as the plaintiff, in March, 1925, had not procured a license from the City of Chicago to act as a real estate broker, although he was at that time and had been for years engaged in the business of a real estate broker, the exclusive agency contract of March, 1925, was void. This contention must be sustained. (See Bouthart v. Congdon, 197 Ill. 349; also DeKam v. City of Streator, 316 Ill. 133, 131.) The defendant also cites a number of cases that announce the well settled rule that a real estate broker who has not complied with the ordinance in question

1933 until 1935. The fact that the witness did not know the exact date the ship left is immaterial to the issue of whether the witness was in the vicinity of the ship at the time it was sighted. The witness testified that he was in the vicinity of the ship at the time it was sighted.

On the 11th day of May, 1935, the ship was sighted by the witness. The witness testified that he was in the vicinity of the ship at the time it was sighted. The witness testified that he was in the vicinity of the ship at the time it was sighted.

It was found that the witness's testimony was reliable. The witness testified that he was in the vicinity of the ship at the time it was sighted. The witness testified that he was in the vicinity of the ship at the time it was sighted.

The witness testified that he was in the vicinity of the ship at the time it was sighted. The witness testified that he was in the vicinity of the ship at the time it was sighted.

cannot recover for his services. The plaintiff concedes that the license obtained on April 30, 1925, cannot be given a retroactive effect, but he contends that "the plaintiff's action is based on services rendered after he obtained his license and is not based on any services rendered before obtaining the license," and he further contends that after the license was obtained on April 30, he procured for the defendant a purchaser for her property and obtained for her the Ready contract, and that he is therefore entitled to his commission. To this contention the defendant answers (inter alia) that the plaintiff introduced absolutely no evidence of the value of the services he rendered after he obtained the license and that therefore he failed to make out a prima facie case. The plaintiff concedes that he did not offer any evidence as to the value of his services after he obtained the license, but he contends that the provision in the exclusive agency contract whereby the defendant agreed to pay a commission of three per cent of the purchase price, fixes his commission. We are unable to acquiesce in this contention. Under the law and the facts of this case the exclusive agency contract was void and the provision in question can have no evidentiary value. As the plaintiff failed to introduce any evidence as to the value of his services after he obtained the license, it follows that he did not make out a prima facie case against the defendant, and the judgment of the Superior Court of Cook County must be affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

cannot recover for his services. The plaintiff testified that the
 license obtained on April 18, 1912, should be given a retrospective
 effect, but the defendant said "the plaintiff's action is based on
 services rendered after he obtained his license and is not based
 on any services rendered before obtaining the license", and he further
 testified that after the license was obtained on April 18, he presented
 for and obtained a partnership for his property and obtained for him
 the heavy contract, and that he is therefore entitled to his commission.
 To this contention the defendant answers (first) that the plain-
 tiff furnished practically no evidence of the value of the services
 he rendered after he obtained the license and that therefore he failed
 to make out a prima facie case. The plaintiff answered that he did
 not offer any evidence as to the value of his services after he ob-
 tained the license, but he contends that the question is as to
 whether or not he rendered services before the defendant agreed to pay a
 commission of three per cent of the business done. Since his
 contention is the matter to be decided in this case. That
 the law and the facts of this case are such that the defendant clearly
 owes and the plaintiff is entitled to recover and there is no question
 and the plaintiff failed to introduce any evidence as to the value of his
 services after he obtained the license, it follows that he did not
 make out a prima facie case against the defendant, and the judgment
 of the superior court of Cook County must be affirmed.

JUDGE

CRITCHEY, J., and BREWER, J., concur.

250 I.A. 638'

32700

THE STEARNES COMPANY,
a corporation,
Appellee,

v.

EMBASSY HOTEL COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This was an action ex contractu, filed in the Municipal Court of Chicago by The Stearnes Company, a corporation, against Embassy Hotel Company, a corporation, for the purchase price of some chinaware alleged by the plaintiff to have been sold and delivered to the defendant on November 29, 1926. There was a trial by the court without a jury and a finding in favor of the plaintiff for \$76.52. Judgment was entered on the finding, and this appeal followed.

The defendant company became the owner of the Embassy Hotel in June, 1926, and operated in connection therewith the restaurant on the premises until October 1, 1926, when it leased the restaurant and the equipment therein to one John V. O'Connor. The latter paid the defendant one month's rent and abandoned the restaurant about January 1, 1927. He then owed the defendant about \$1800 under the lease, and the latter, under a distress warrant, seized the personal property of O'Connor that was found in the restaurant. The plaintiff claims that during the time O'Connor occupied the restaurant he ordered from it, through one of its salesmen, the chinaware in question, and stated to the salesman that he was employed by the hotel as restaurant manager, and that, relying upon this statement of

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1. The first group of people who are interested in the results of the study are the researchers themselves. They want to know if the study was successful in achieving its objectives and if the data collected is reliable and valid.

100

(continued)

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Journal of Interpersonal Violence 29(7) doi:10.1177/0886260514534292

Revised manuscript received 12 November 2003; accepted 12 November 2003

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Figure 4.11: A plot of the function $f(x) = \sin(x)$ for $x \in [0, 2\pi]$. The x-axis is labeled x and ranges from 0 to 2π . The y-axis is labeled $f(x)$ and ranges from -1 to 1. The curve starts at (0,0), reaches a maximum at $(\pi/2, 1)$, crosses the x-axis at $(\pi, 0)$, reaches a minimum at $(3\pi/2, -1)$, and ends at $(2\pi, 0)$.

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For the purpose of this study, the following hypotheses were formulated:

THE UNIVERSITY OF CHICAGO PRESS

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"I have been very busy since I was last here," he says.

as indicated on the attached map.

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...and the

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O'Connor, the plaintiff delivered the merchandise to the restaurant.

The plaintiff concedes in its brief that "the evidence further discloses that said O'Connor was not so employed by the Hotel Company, but was in fact operating said restaurant on his own account, under a lease to him from the Hotel Company of the restaurant and all equipment, dated October 1, 1926," and claims that after it learned that O'Connor had no authority to bind the defendant that the plaintiff "then requested (the defendant) several times to either pay for the chinaware or return the same. It did neither, but continued to use the chinaware in its operation of the restaurant thereafter." The plaintiff company had in the past sold merchandise to O'Connor when he ran a restaurant in another place. The manager of the defendant company testified that the restaurant was operated under the name of John V. O'Connor, and it is perfectly clear from the accounts of the plaintiff company and from certain letters written by the plaintiff to the defendant that the former recognized that its claim for the chinaware was against O'Connor and not against the defendant company. In fact, in one of its letters it states that it was convinced that the charge should be made against O'Connor direct. From the letters of the plaintiff it plainly appears that the position of the plaintiff was, that when the defendant seized all the equipment in the restaurant under the distress warrant, and when it thereafter conducted the restaurant, it was in fact using the chinaware that had been sold to O'Connor and that it was no more than fair that the defendant company should either pay the plaintiff for the same "or be fair enough to pack up this merchandise in a suitable container and notify us when our truck may call for it." The manager of the hotel testified: "I never saw any of the Stearns Company dishes in

Thereafter, the plaintiff requested the defendant to pay the balance.

The plaintiff submitted in its brief that "the evidence

therein reflects that when defendant was not so engaged by the

Hotel Company, but was in fact operating this restaurant on his own

account, under a lease to the Hotel Company of the restaurant

and all equipment, dated October 1, 1931," and stated that after it

learned that defendant had no authority to lease the restaurant from

the plaintiff, then requested the defendant several times to either

pay for the balance or return the same. It is further, that when

called to see the defendant in the operation of the restaurant (then

after, "The plaintiff company has in the past sold merchandise to

defendant when he was a defendant in another place. The amount of

the defendant's account is stated in the defendant's own statement

under the name of John W. defendant, and is in part, all other than the

amounts of the plaintiff's company and from certain other sources

by the plaintiff in the statement that the plaintiff's company has

given for the balance was against defendant and was against the

defendant company. In fact, in fact, it is stated that it

was concluded that the plaintiff should be paid against defendant's

from the balance of the plaintiff's company appears that the plaintiff

of the plaintiff was, and when the defendant failed to pay, payment

in the restaurant under the defendant's name, and when it is further

concluded the defendant, it was in fact found the defendant had

been paid to defendant and that it was no more than that the

defendant company would either pay the plaintiff for the same "or

be left without to pay up this merchandise in a suitable manner

and finally no more was known by the plaintiff. The manager of the

Hotel Company stated, "I never saw any of the defendant company since in

the restaurant but would not recognize them if I had. I did not, at any time, promise to pay the debt of John V. O'Connor. * * * I did not tell him that this chinaware was there and I would return it."

The defendant contends, and justly, that it is not responsible for the chinaware ordered by O'Connor. When the plaintiff delivered the chinaware to O'Connor, title to the same passed to O'Connor, and under the circumstances of the present case the plaintiff must look to O'Connor for the purchase price of the merchandise.

The judgment of the Municipal Court of Chicago is reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

Gridley, P. J., and Barnes, J., concur.

the respondent had could not possibly have been I said. I did not,
 at any time, promise to pay the debt of John V. O'Connor. I did not
 did not tell him that this statement was true and I would return it.
 The defendant testified, and testified that it is not responsible
 for the amount entered by O'Connor. When the plaintiff delivered
 the statement to O'Connor, it is to the same person as O'Connor, and
 under the circumstances of the present case the plaintiff was back
 to O'Connor for the purpose of the memorandum.
 The judgment of the Municipal Court of Chicago is reversed
 also a finding of facts.

Ordley, C. J., and Barnes, J., concur.

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FINDING OF FACTS.

We find, as ultimate facts in the case, that the defendant did not purchase from the plaintiff the merchandise mentioned in the statement of claim, and that the defendant did not receive from the plaintiff the said merchandise and did not promise the plaintiff to pay for the same.

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LETTER TO THE EDITOR

We find, as always, that in the case of the
 defendant it is not possible to find the plaintiff's
 position in the absence of a claim, and that the defendant
 did not receive from the plaintiff the same consideration as
 did not provide the plaintiff to pay for the same.

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RUDOLPH BESKIN, NATHAN BLITZSTEIN
and HERMAN KAPLAN,

Appellees,

v.

CITY OF CHICAGO,
a municipal corporation,

Appellant.

INTERLOCUTORY APPEAL
FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On February 16, 1926, the complainants, Rudolph Beskin, Nathan Blitzstein and Herman Kaplan, filed a bill in the Circuit Court of Cook County, against the defendant, City of Chicago, a Municipal Corporation, to enjoin the latter "from making any effort or taking any steps or instituting any proceedings in said Municipal Court of Chicago or elsewhere," to enforce an ordinance passed by the City of Chicago on May 19, 1926, entitled, "An Ordinance Licensing and Regulating Dealers in Junk," or any of the provisions of the same, "and also from in any way interfering with, molesting or disturbing your orators or other junk dealers situated substantially as they are from conducting and carrying on their business without procuring licenses from said City of Chicago, under and pursuant to said ordinance." On February 18, 1928, the chancellor entered the following order:

"On motion of Harry B. Chapman, and Chester E. Cleveland, solicitors for complainants, their motion for a temporary injunction is hereby set for hearing on Friday, the 24th day of February, A. D. 1928, and until the disposition of said motion it is ordered that the City of Chicago be and it is restrained from enforcing or attempting to enforce the ordinance of May 19, 1926, set up in the bill of complaint by proceedings in court, arrest or otherwise." (Italics ours.)

The defendant has appealed from that order.

The complainants insist that the order in question is not one within the contemplation of section 123, chapter 110, of the Revised Statutes, and that therefore this appeal should be dismissed. There is no merit in this contention. The italicized part of the order in question is in purpose and effect a temporary injunction order within the meaning and intent of section 123. The argument of the complainants that the defendant had no right to an appeal under section 123 until the motion of the complainants, set for February 24, 1928, was heard and determined adversely to the defendant is also without merit. Under section 123, when the temporary injunction order in question was entered the defendant had the right to at once take an appeal from the same, without making any motion to dissolve or modify the order and without reference to the motion set for February 24, 1928.

On this appeal it is only necessary to cite the following parts of the ordinance in question:

"3511. Definitions. The term 'junk' as used in this chapter, shall be held to mean and include old iron, chain, brass, copper, tin, lead or other base metals, old rope, old bags, rags, waste paper, paper clippings, scraps of woollens, clips, bagging, rubber and glass, and empty bottles of different kinds and sizes when the number of each kind or size is less than one gross, and all articles and things discarded or no longer used as a manufactured article composed of or consisting of any one or more of the materials or articles herein mentioned.

"The term 'junk dealer,' as used in this chapter, shall be held to mean and include every person, firm or corporation that shall engage in the business of buying, selling, bartering or exchanging, or that shall collect, receive, store or hold in possession for sale, barter or exchange, any of the things in and by this section defined as junk, whether dealing at wholesale or at retail, or as a junk peddler.

"The term 'wholesale junk dealer,' as used in this chapter, shall be held to mean and include every person, firm or corporation engaged in the business of buying, selling, bartering or exchanging in large quantities, or that shall collect, receive, store or hold in possession for sale, barter or exchange in large quantities, any

of the things in and by this section defined as junk; provided, that dealing in large quantities shall be understood to mean that the customary and usual separate transactions both of purchases and sales shall consist of the purchase or sale of car load lots, or lots of ten tons or more of metals, or lots of ten bales or more of rags, and correspondingly large lots of any other junk dealt in; and, provided further, that purchasers of old or waste metals in large quantities shall be regarded as wholesale junk dealers unless they actually operate within the City a plant for the smelting or refining of such metals.

"The term 'retail junk dealer,' as used in this chapter, shall be held to mean and include every person, firm or corporation that shall engage in the business of buying, selling, bartering or exchanging, or that shall collect, receive, store or hold in possession for sale, barter or exchange any of the things in and by this section defined as junk where the usual and customary purchases consist of quantities of less than the amounts customarily purchased by wholesale junk dealers as herein defined, or purchases from junk peddlers; provided, that a junk peddler as herein defined who does not occupy premises leased or purchased especially for the purpose of such business shall not be deemed a 'retail junk dealer' under the terms of this ordinance. * * *

"3512. * * * No person, firm or corporation licensed under the terms of this ordinance as a retail junk dealer shall be permitted under his or its retail dealer's license to purchase junk, as defined in this ordinance, from another retail junk dealer, or to purchase junk in carload lots or in large quantities as defined herein; provided that any retail junk dealer that desires to purchase junk in such manner or such quantities may secure a separate license as a wholesale junk dealer if the wholesale business is carried on entirely distinct from the retail business, as hereinafter provided. * * *

"3520. License fee. The annual license fee for a retail junk dealer shall be two hundred dollars. The annual license fee for a wholesale junk dealer shall also be two hundred dollars. Every junk dealer, whether wholesale or retail, who shall operate a junk wagon or junk boat in connection with his business shall pay the sum of fifteen dollars annually as a license fee therefor to the City Collector. A separate license shall be obtained for each and every junk wagon used in such business. All licenses shall expire on the 31st day of December of the year in which they are issued."

In the bill the complainants allege (inter alia) that they are and have been for some time engaged in "what is commonly known and understood to be the junk business;" that their places

of business are small, their equipment of little value; that their stock on hand varies in value and amounts to about \$200 to \$250 for each of two of them and that it does not exceed \$60 as to the third; that they employ little or no regular help; that their business consists in the purchase of scraps of rags and old iron and other discarded materials, the picking, separation and classification of the same, and the sale of these materials in bundles and bales; that at the time of the passage of the ordinance there were approximately 250 dealers in junk, within the definition of the same in the ordinance, in the City of Chicago; that the business of these dealers varies; that some, like the complainants, do a business of from \$5000 to \$10,000 a year, and others do a business of from \$900,000 to \$1,000,000 a year; that the license fee for a retail and wholesale junk dealer is fixed by the ordinance at \$200 per year; that the definition of junk contained in the ordinance was not warranted by the statute and that it goes far beyond the meaning of the word junk. The complainants further allege that to charge them the same license fee as large dealers makes the ordinance unreasonable, unjust, oppressive, confiscatory, discriminatory and prohibitory; that there are 200 cases pending in the Municipal Court of Chicago in which the defendant seeks to have different persons fined for the violation of the ordinance in not taking out licenses, that the defendant's officers threaten other like proceedings and that the bill is filed on behalf of the complainants and all junk dealers similarly situated. The complainants, on March 13, 1928, filed an amendment to the bill, in which they allege that they rarely, if ever, have a separate transaction consisting of either a purchase or sale of a carload lot, or of ten tons of metals or of ten bales of rags, but that their usual and customary purchases do not exceed

one ton of metals and one bale of rags; that their usual and customary sales are not over two tons of metals and five bales of rags and that it would be practically impossible for them to carry on their businesses if they were obliged to accumulate larger lots; that the only persons who purchase from them are dealers in junk, some of whom purchase in large lots, but most of whom purchase, as a rule, in lesser amounts, and that therefore the ordinance deprives the complainants of the only market for their product by prohibiting the wholesale junk dealers from purchasing in less quantities than carload lots, or ten tons of metals or ten bales or more of rags and correspondingly large lots of other materials defined as junk by the ordinance. The amendment further alleges that the ordinance is indefinite and uncertain and that its meaning cannot be ascertained; that the provision regarding wholesale junk dealers who operate a plant for smelting or refining metals is vague, and that it is discriminatory in that it does not exclude purchasers of junk other than metals who operate plants for the manufacture of cloth, paper, roofing and other products.

The defendant contends that the question to be determined on this appeal is whether the ordinance of May 19, 1926, is valid or invalid. The complainants insist that the question for determination is "whether the chancellor improperly exercised his discretionary power in entering the order in question," and that unless it clearly appears that he has done so the order should be affirmed. The bill is drafted upon the theory that the ordinance in question is invalid. The rule is that the court may grant a preliminary injunction to maintain the status quo where irremediable injury will result from some threatened action before the right is determined, but it is essential that the bill make out a prima facie case for

final relief by alleging facts which, if proved and not controverted, will entitle the complainant to relief. (Baird v. Community High School District, 304 Ill. 526, 529.) The question for us to determine, therefore, is whether the ordinance of May 19, 1926, is valid or invalid.

The defendant, under clause 95 of section 1 of Article V of the Cities and Villages Act is given the power "to tax, license and regulate * * * junk stores and yards, * * * and to direct the location thereof." The complainants insist that the power thus delegated is to "'tax, license and regulate' things, viz: junk stores and yards; not persons, businesses or occupations." Statutes must be given a reasonable interpretation, and we are of the opinion that it would be impossible for the defendant to tax, license and regulate junk stores and yards unless it also had the authority to regulate persons who conduct the same. As to the present contention, we think the case of City of Chicago v. Ornstein, 323 Ill. 258, is in point. The clause of the act involved in that case provided that the city council shall have power "to tax, license and regulate auctioneers," etc., and the court held that the purpose of the enabling act was to grant to cities authority to regulate, among others, the business of selling goods by auction. There is no merit in the present contention.

The complainants contend that "the ordinance is so unreasonable, oppressive and discriminatory, if not confiscatory, that it should be declared to be void." It would be quite impossible within the limits of an opinion to follow in detail the entire argument of the complainants in support of the instant contention. We shall refer, however, to what seem to us to be the major points.

The complainants state that "the obnoxious sections of the ordinance are those pertaining to the granting of licenses and

final trial by alleging facts which it proved and not controverted,
will entitle the complainant to relief. United v. Community Milk
Edward J. Smith, 200 Ill. App. 2d, 280. The question in an application,
therefore, is whether the substance of what is alleged is well
founded.

The defendant, which states it at section 1 of article 1
of the Illinois Constitution, is given the power "to pass laws
and regulate the same" (from statute and code, "and to direct the
execution thereof"). The constitutional issue is that the power
delegated is to "local, domestic and vegetable" things, and that
and police and justice, business and government. "The power must be
given a reasonable interpretation, and to the effect that it
would be impossible for the defendant to pass laws and regulate
such things and police which is also the authority to regulate
business and conduct the same. as to the present constitution, as to
the case of United v. Community Milk, 200 Ill. App. 2d, 280, is in point.
The clause of the act involved in this case provided that the city
council shall have power "to pass laws and regulate the same",
etc., and the court said that the purpose of the act was to give
power to the city authority to regulate, control, and police the
selling goods by mail. There is no doubt in the present constitution.
The constitutional issue is that "the defendant is to be
transacted, regulated and administered, it may be necessary,
that it should be necessary to be able to pass laws and regulate
within the limits of an opinion to follow in which the entire purpose
of the complainant is to support of the present constitution. It shall
be clear, however, to the court, as to the present
The complainant states that "the defendant is to be
the defendant are also necessary to the question of the present

the business which the licensee is licensed to do." They contend that "the city council, under the power delegated to it to tax, license and regulate junk shops and yards, could not by definition or declaration make a new creation and call it junk and then license and regulate this new creation." In support of this contention the complainants argue that "the ordinance of May 19, 1926, has attempted to declare or define that to be junk which is not and never was junk; and to tax, license and regulate junk as created by the ordinance; and not what is in fact junk." When the definition of the term "junk" as used in the ordinance is considered in the light of the definitions given by the standard dictionaries, text books and judicial cases, it becomes apparent, we think, that there is not the slightest merit in the instant contention. Counsel for the complainants have not pointed out to us anything that is included in the definition of junk in the ordinance that would not be considered junk under the definitions given in the above authorities.

The complainants contend that there is discrimination in the ordinance in that small dealers are subject to the same license fee as large dealers, and retail dealers are subject to the same license fee as wholesale dealers; and the complainants further contend that "the terms and regulations of this ordinance are so obviously and grossly unreasonable and discriminative as to justify and require the court to hold that the city council exceeded its power in passing it." We are of the opinion that the ruling in the case of McGrath v. City of Chicago, 309 Ill. 515, and the reasons advanced by the court in support of the same fully answer the first contention, and adversely to the complainants. In reference to the present contention it must be remembered that it has been frequently held that the business of a retail junk

the business which the license is licensed to do. They contend that "the very language, which the court adopted in its opinion, license and regulate their shops and houses, could not be construed or restricted to a new creation and still be true and clear license and regulate their new creation." In support of this contention the complainants argue that "the ordinance of May 18, 1928, has attempted to restrict the license to the same extent as not and never was given; and so far, license and regulate their shops and houses by the ordinance; and not still in its own right." Then the definition of the term "shop" as used in the ordinance is considered in the light of the ordinance given by the complainants, that shops and houses are included in the ordinance, as shown by the ordinance. It is argued that there is not the slightest doubt in the ordinance as shown by the ordinance that the complainants have not pointed out in the ordinance that is included in the definition of shop in the ordinance that would not be restricted to the same extent as the ordinance given in the ordinance.

The complainants contend that there is no restriction in the ordinance in that small section and subject to the same license the no larger section, and that section is subject to the same license for an ordinance defining and the complainants further contend that "the license and regulations of that ordinance are so obviously and greatly unreasonable and disadvantageous to the public and regulate the courts in that the ordinance is so clearly in power in passing it." The aim of the ordinance that is being in the case of Smith v. City of Chicago, 200 Ill. 218, and the reasons advanced by the court in support of the same will appear in the first contention, and especially in the complainants' reference to the present ordinance it must be remembered that it has been previously held that the license of a retail shop

dealer, especially in a large city, is an appropriate object of police supervision because of the opportunities it often affords for the disposition of stolen property, and the purpose of regulation, as well as that of revenue, must be considered in determining the question as to whether or not the license fee as to retail junk dealers is fair and reasonable. Nor is there merit in the contention that there is gross and unreasonable discrimination in the ordinance because the regulations are more rigid in the case of retail dealers than in the case of wholesale dealers, while the materials handled are the same. As was stated in the case of City of Chicago v. Lowenthal, 442 Ill. 404, 408, regulations that might be entirely proper as a police regulation in the case of the keeper of a junk shop where junk is bought and sold in small quantities, if applied to a wholesale dealer would be impracticable and burdensome and an unreasonable interference with the business of the latter. (See also Smolensky v. City of Chicago, 232 Ill. 131.)

The complainants argue that by the terms of the ordinance the retail dealer is prevented from selling to the wholesale dealer and that the complainants are thereby deprived of an ordinary and usual market for the sale of their merchandise. We have given careful consideration to this contention and we are satisfied that a reasonable interpretation of the terms of the ordinance does not justify such a contention.

The ordinance in question in the present case was before the Supreme Court in the case of City of Chicago v. Adelman, 326 Ill. 58. In holding the ordinance valid the court said: "So far as we are able to see, the license provision of the ordinance and the classification of junk dealers are neither unreasonable, oppressive, discriminatory nor confiscatory." While that decision

center, especially in a large city, is an important subject of police supervision because of the opportunities it offers to the police for the disposition of stolen property, and the purpose of regulation, as well as that of revenue, must be considered in determining the question as to whether or not the license law as so revised does desire in fact and reasonably. But it seems well in the conclusion that there is ground for reasonable discrimination in the evidence between the regulation and more right in the case of retail dealers than in the case of wholesale dealers, while the wholesale market and the same. As was stated in the case of Ill. of Chicago v. Board of Police, 221 Ill. 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

(See also Chicago v. Board of Police, 221 Ill. 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The ordinance upon which by the terms of the ordinance the retail dealer is prohibited from dealing in the wholesale dealer and that the ordinance and thereby rendered of no effect and usual market for the sale of their merchandise. The law gives authority to the board of police to regulate and to the extent that a reasonable investigation of the terms of the ordinance does not justify such a conclusion.

The ordinance in question is the present law and before the Supreme Court in the case of Ill. of Chicago v. Board of Police, 221 Ill. 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

is not res adjudicata as to the present case, nevertheless, it must be given great weight in deciding the major question in the present proceeding.

After a careful consideration of all the contentions raised by the complainants in support of their argument that the ordinance in question is invalid, we have reached the conclusion that it is valid and that therefore the bill of the complainants did not make out a prima facie case for final relief, and we hold that the chancellor was not warranted in entering the temporary injunction order. The order of the Circuit Court of Cook County, of February 18, 1928, is therefore reversed.

REVERSED.

Gridley, P. J., and Barnes, J., concur.

is not yet definitive as to the present state, nevertheless, it must be given great weight in deciding the subject presented in the present paragraph.

After a careful consideration of all the conditions raised by the complaints in regard to their payment and the ornaments in question it is evident, we have reached the conclusion that it is valid and that therefore the bill of the complainants did not take any valid form for the present, and we hold that the complainants were not entitled to receive the ornaments in question order. The order of the District Court of this County, of January 14, 1904, is therefore reversed.

Given, at St. Louis, Mo., this 14th day of January, 1904.

32137

HAROLD E. LEOPOLD,
Appellant,

v.

MILWAUKEE - WESTERN STATE BANK,
a corporation,
Appellee.

6966a
250 I.A. 688³

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. PRESIDING JUSTICE HOLDOM delivered the opinion
of the court.

On January 8, 1934, the complainant, Harold E. Leopold, made his promissory note for the sum of \$15,000, payable six months after date, to his own order and by him endorsed and delivered to the State Commercial & Savings Bank, together with collateral security consisting of 228 shares of the preferred capital stock of the Rogers Park Apartments Building Corporation, evidenced by certificate No. 343, of the par value of \$100 per share. The defendant Milwaukee-Western State Bank acquired said note and collateral when it took over, under an order of the Circuit Court in a certain proceeding instituted by the Auditor of Public Accounts of the State of Illinois, to wind up the affairs of said State Commercial & Savings Bank, all of the assets of said State Commercial & Savings Bank, of which said note of complainant with its collateral was a part.

The bill in this case was filed by complainant to enjoin the defendant from asserting any claim under said note or title to the collateral deposited therewith, and inter alia

820.41038

1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 26

TABLE 2 (continued)

23

2003

100-443887-100

On January 1, 1935, the company, known as
Lynch, was the property of the son of J. H. Lynch,
the son of J. H. Lynch, of the son of J. H. Lynch,
and delivered to the State Comptroller & State Bank,
together with collateral security consisting of the shares of
the preferred capital stock of the Rogers Trust Company
valuing corporation, evidenced by certificate No. 100, of the
net value of \$100 per share. The collateral security was
thereupon received and held and collateral was paid over,
which as a part of the State Bank is a certain procedure
indicated by the nature of the nature of the State Bank
limited, to and by the office of the State Comptroller &
State Bank, all of the assets of the State Comptroller &
State Bank, of which was part of the company with the
collateral was a part.

for this in this case was filed by complaint in
against the defendant from receiving any other money with him
or file to the defendant's attorney, and being with

prayed as follows: "that said defendant, its officers, etc. ** may be temporarily enjoined by a restraining order * * * from transferring, disposing of, selling or hypothecating the said note * * and the said collateral therein described until the further order of the court; that upon a full hearing * * * that the court may order, decree and direct the said defendant to return the said note to your orator and the said collateral therein described, and that a permanent injunction may be issued in the usual form perpetually restraining the said defendant, its officers, etc. * * from in any way, directly or indirectly, transferring, selling, disposing of or hypothecating said note and the said collateral therein described," and for other and further relief.

At first defendant interposed a general demurrer, which was overruled, and thereupon defendant answered the bill, denying all of the material allegations of said bill, which would, if maintained, entitle complainant to a cancellation of said note and a surrender of the collateral deposited with it. Upon a full hearing before the chancellor there was a finding in favor of defendant, and complainant's bill was dismissed for want of equity, and he brings the record here for our review by appeal, contending for reversal that the decree is contrary to the weight of the evidence, to law, equity and good conscience; that the Circuit Court erred in dismissing the bill for want of equity and in denying complainant's prayer for relief, and in refusing to enter a decree in accordance with the prayer of said bill.

Complainant strenuously contends that the relief

prayed as follows: "That said defendant, the officers, etc.
" may be lawfully seized by a trespassing officer " * * *
from trespassing, abetting or assisting in the commission of the
said offense " and the said defendant therein described until
the further order of the court; that upon a bill returned " * * *
that the court may order, decree and direct the said defendant
to return the said note to your office and the said defendant
therein described, and that a warrant in relation may be
issued in the name of the court for the recovery of the said
defendant, the officers, etc. " from in and out, directly or
indirectly, abetting, assisting, abetting or assisting in
saying said note and the said defendant therein described,
and for costs and further relief.

At first defendant introduced a general defense,
which was overruled, and then on behalf of defendant the bill,
denying all of the material allegations of said bill, which
would, if sustained, entitle complainant to a declaration of
said note and a return of the said note deposited with it.
Upon a full hearing before the commission there was a finding
in favor of defendant, and complainant's bill was dismissed for
want of equity, and he having the benefit of the law and justice by
appeal, complaining for reversal that the decree is contrary to
the weight of the evidence, to law, equity and good conscience;
that the circuit court erred in granting the bill for want of
equity and in denying complainant's prayer for relief, and in
refusing to enter a decree in accordance with the rights of
said bill.

Complainant strenuously contends that the trial

prayed should be granted for the reason that his \$15,000 note, above recited, was given without consideration and for the accomodation of the bank, and with the understanding and agreement that in due time the note and collateral would be returned to him without payment.

The \$15,000 note hereinabove mentioned is the note involved in this litigation, but preceding the transaction in which the complainant gave the \$15,000 note, he had deposited with the State Commercial & Savings Bank as collateral security \$25,000 of bonds of the S-L Finance Corporation. Complainant was a stockholder and director of the State Commercial & Savings Bank when the \$25,000 worth of bonds, heretofore referred to, had been deposited with the bank. Leopold was also a member of the finance committee. He was a stockholder and director in the bank in January 1922, but resigned as director on February 6, 1923.

The State Commercial & Savings Bank in November 1921 suffered an impairment of its capital, as developed by an examination of the bank made by the Auditor of Public Accounts of Illinois. Such examination disclosed a deficit in the neighborhood of \$300,000, and Mr. Henry Savage, chief examiner in charge of the Chicago office, called in its directors, and as a condition to its continuance in business required them to sign an indemnity agreement indemnifying the depositors and creditors of the bank against all loss up to \$313,000, until some future time when some other provision could be made to replace the bank's losses. The actual losses at that time, as subsequently determined, were approximately

\$245,000. The guaranty signed by the directors, including Leopold, placed the losses at \$313,000, although the depreciation account of the bank in January, 1922, showed such losses, as charged off by the bank, at \$245,327.86. In January, 1922, in the conference with Mr. Savage of the State Auditor's office, the board of directors approved by Savage, was elected, and it was agreed to place new securities and assets in the bank for the purpose of discharging the deficit and relieving the directors of the guaranty executed by them. Leopold was one of the new directors. Prior to the election of the directors Savage called all of those to be elected, including Leopold, to his office explaining the entire situation to them, and it was then agreed that the bank should be rehabilitated by placing \$245,000 of money and securities in the bank.

Savage testified that "Those securities were not at the bank. They were proposed to be put in the bank. Nobody said anything with reference to any conditions that were to be imposed upon the deposit of those securities. Walter Stein said, 'We offer these assets' as disclosed in that schedule that he gave to the bank. At the meeting of January 26, 1922, Mr. Guernsey, Mr. Adams, Mr. Leopold, Mr. Russel and myself were present. I told these gentlemen there present the details of the plan about putting these securities in the bank to take out the securities that were objected to, and in which this agreement was given as a security, in order that the bank might continue to do business at that time. I told them, Mr. Leopold, Mr. Guernsey and Mr. Adams, that the Auditor, who was then present, would agree to the plan and that the department would depend upon those three gentlemen for the

200,000. The money was paid to the Government, including
Lentini, about the same as 200,000, although the Government
did not account of the fact in January, 1933, about 200,000
as charged off by the bank, at 1933, 200,000. In January, 1933,
in the conference with Mr. Davis of the State Auditor's office,
the books of Lentini were reviewed by Davis, and it
was agreed to place the accounts and assets in the bank for
the purpose of eliminating the details and relieving the
directors of the company extended by them. Lentini was the
of the new director. That is the situation of the directors,
Lentini called all of them to be elected, including Lentini,
so his office was the only office elected to them. He
it was then agreed that the bank would be liquidated at
planning 1933, 200,000 of money and assets in the bank.

Between Lentini and the directors was not
at the bank. They were supposed to be in the bank, Lentini
said regarding the reference to the directors that was in
be imposed upon the details of those accounts. Lentini
Lentini said, "The other directors were elected in this
schedule that he gave to the bank. At the meeting of January
22, 1933, Mr. Davis, Mr. Davis, Mr. Davis, Mr. Davis,
and others were present. I told them that the directors were
the details of the plan about Lentini. When Lentini was in the
bank to take the inventory that was ordered by him, and it
was then agreed that the bank would be liquidated at
planning 1933, 200,000 of money and assets in the bank.

proper conduct of the bank. That's the substance of that conversation. Mr. Russel was Auditor of Public Accounts for the State of Illinois. I don't think that the gentlemen in question had been elected directors at that time. I think the regular annual meeting was to be in January, the early part of January, and it was delayed until the latter part, I think the 30th or possibly the 31st of January. I don't recall but I know it was postponed. Each one of them replied that they would accept those conditions and carry out the plan."

In accordance with that agreement Leopold was elected a director in January, 1922.

Among the securities thus proposed to be placed in the bank were the \$25,000 S-L Finance Corporation bonds of Leopold. There is some dispute as to the conditions under which the bonds were received by the bank. The bank's records show that the bonds were purchased by the bank. There was a debit ticket which evidenced the purchase by the bank of the \$25,000 bonds January 24, 1922. On the same date there was opened in the general ledger of the bank a special depreciation account to which was credited various securities aggregating \$246,553.38 deposited by Walter Stein in accordance with his agreement with the Auditor. The total included Leopold's S-L Finance Corporation bonds. The securities ledger of the bank also showed that those bonds were purchased by the bank on January 24, 1922, and thereafter until the giving of the note and securities in question in this cause, they were so carried by the bank and so reported to the State Auditor of Public Accounts. Every record of the bank and every report submitted

proper conduct of the bank. During the absence of that
organization. Mr. Hannay was notified of the same by the
the State of Illinois. I don't think that the Government in
question had been elected director at that time. I think the
regular annual meeting was to be in January, the early part of
January, and it was delayed until the latter part. I think the
15th or possibly the 1st of January. I don't recall and I
know it was postponed. I don't know of them until they
would accept those conditions and carry out the plan."

In accordance with that agreement Hannay was

elected a director in January, 1931.

During the period when Hannay was elected in

the bank were the \$10,000 3-1 Finance Corporation bonds of
Chicago. There is some dispute as to the conditions under
which the bonds were received by the bank. The bank's records
show that the bonds were purchased by the bank. There was a
check listed which evidenced the purchase by the bank of the
\$10,000 bonds January 24, 1931. On the same date there was
opened in the general ledger of the bank a special department
account to which was credited various amounts representing
the \$10,000, as indicated by other items in connection with the
agreement with the bank. The bank's records show that
the Finance Corporation bonds. The condition of the
bank also shows that these bonds were purchased by the bank on
January 24, 1931, and thereafter until the time of the sale
and recorded in connection with this matter, they were so recorded
by the bank and as recorded in the State Auditor of Illinois
records. They record of the bank and every record connected

to the Auditor of Public Accounts by the bank treated the bonds as assets of the bank, purchased by the bank in the usual way above indicated.

Leopold many times demanded of Walter Stein a return of the S-L Finance Corporation bonds to him. No demand was ever made upon the bank for the return of the bonds, nor upon any one connected with the bank saving Walter Stein. By arrangement on January 3, 1924, between Walter Stein and Leopold, an agreement was entered into by which the bank loaned \$15,000 to Leopold upon his note in that sum, being the note involved in this suit, together with the collateral security given therewith. This transaction was entered upon the books of the bank as follows: The discount ledger of the bank showed that on January 3, 1924, a loan was made to Leopold maturing in six months for the sum of \$15,000, and on that date a check issued to him to cover that loan. The cashier's check in the sum of \$15,000 was then issued, payable to the order of Leopold, and a deposit slip was made out at the same time, and the \$15,000 check was deposited by Leopold in his account with the bank. The liability ledger of the bank showed the loan to Leopold. The ledger account of Leopold showed a deposit of \$15,000 in his account on January 3, 1924, and a withdrawal of that sum on the same day. Leopold signed a check on his account with the bank in the sum of \$15,000 payable to the State Commercial & Savings Bank, and delivered it to Mr. Golden, the cashier of the bank, who handed Leopold \$15,000 of the S-L Finance Corporation bonds, and the remaining \$10,000 were thereafter delivered to Walter Stein. A credit slip covering the transaction recited a sale of the bonds to Leopold. The records of the bank show that Walter Stein

in the matter of public accounts by the bank through the funds
on assets of the bank, maintained by the bank in the name of
above indicated.

Joseph's wife also claimed of Walter \$1000
of the \$10,000 Corporation funds in 1914. In 1914
was ever made upon the bank for the return of the funds, and
upon any one connected with the bank either Walter or
Joseph, an agreement was entered into by which the bank
loaned \$10,000 to Joseph upon his note in 1914, and, being the
note involved in this case, connected with the matter of
security from Joseph. This transaction was entered upon
the books of the bank as follows: The amount of \$10,000
paid ahead to Joseph on January 1, 1914, a loan was made to
Joseph's account in six months for the sum of \$10,000, and
on that date a check issued to him to cover that loan. The
cashier's check in the sum of \$10,000 was then issued, payable
to the order of Joseph, and a check also was made out to
the same firm, and the \$10,000 check was deposited by Joseph
in his account with the bank. The liability of the
bank against the loan to Joseph. The ledger account of
Joseph showed a deposit of \$10,000 in his account on January
1, 1914, and a withdrawal of that sum on the same day. Joseph
showed a check on his account with the bank in the sum of
\$10,000 payable to his wife (Josephine) a Savings Bank, and
delivered it to Mr. Cohen, the cashier of the bank, who issued
Joseph \$10,000 of the \$10,000 Corporation funds, and the
remaining \$10,000 was deposited in Walter's name.
A check also covering the Corporation funds a note of the
bank to Joseph. The records of the bank show that Walter's

paid \$10,000 for the remainder of the S-L Finance Corporation bonds, which were sold to him by the bank.

On February 20, 1924, the Auditor of Public Accounts filed a bill in the Circuit Court of Cook County for the appointment of a receiver to wind up the affairs of the State Commercial & Savings Bank. The receiver was appointed, and among the assets was the note and collateral of Leopold now in controversy. Subsequent proceedings were had in said winding-up suit that the bank was liquidated and under an order of court all of its assets, among which was the note and collateral of Leopold in controversy, sold and transferred to the defendant bank, and under such sale the defendant claims the title to the Leopold note and collateral.

Leopold testified that the transactions with the State Commercial & Savings Bank were simply for the accommodation of the bank, and that he received no consideration for either of the transactions.

Leopold as a stockholder and director of the State Commercial & Savings Bank was financially responsible to the creditors of the bank for depreciation of the capital stock of the bank and of its assets. This was a liability which under the agreement above recited, was met by the directors at the time when the \$25,000 of bonds were given by Leopold as assets of the bank toward paying its liabilities. That was a sufficient and a good and valid consideration moving to him from the bank for his note and collateral. This transaction, Leopold ratified, when he gave the note and collateral in question in this suit, and received back the \$25,000 of bonds of the S-L Finance Corporation, and the books of the bank

On February 20, 1944, the subject of this document filed a bill in the District Court of New Mexico for the appointment of a receiver to take up the affairs of the State Industrial & General Bank. The receiver was appointed, and through the process was the bank and collection of assets was in conformity. Subsequently proceedings were had in which winding-up was held and bank was liquidated and assets ordered to be sold all of its assets, which were sold and collected as required in conformity, and the proceeds were collected and paid, and when the bank was liquidated the title to the bank's assets was transferred.

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known as a "blackbird" and directed at the state
Commercial & Savings Bank was financially responsible to the
owners of the bank for the operation of the bank until the
of the bank and at the same time, the bank was a "blackbird" and
under the agreement never received, was not by the directors
at the time when the \$1,000 of bonds were given to the bank
as a result of the bank having paid the \$1,000. That was
a gift and not a loan and with the understanding that the
from the bank the bank was not allowed. This agreement,
known as the "blackbird", when he gave the bank and received in
exchange for the bank, and received from the \$1,000 of bonds
of the bank, the bank was not allowed, and the bank of the bank

categorically show that the transaction involved in the \$15,000 note in question was a loan by the bank of that amount of money to Leopold. Contemporaneous verbal agreements with the bank or with its officers contrary to the conditions of the note are not available as a defense to defeat a recovery in accordance with the terms of the note signed by him and the collateral deposited as security therefor.

Under the evidence given on the trial and the undisputed facts appearing in the record, the plaintiff Leopold was estopped to question the bona fides of the transaction between himself and the State Commercial & Savings Bank or its binding force. To hold otherwise would defeat the very object which was desired and intended to be attained by all the parties in interest, which was to make good the depleted assets of the bank, and would in effect result in fraud upon the bank's creditors. The deficit was made up by the directors under the direction and with the consent of the State Auditor of Public Accounts, in faith of which the bank was allowed to continue to do business, and in so doing Leopold simply voluntarily bore his share of the responsibility, which if the bank had been closed at that time he might have been compelled to do by action in the courts.

In Handley v. Drum et al. 237 Ill. App. 587, it is stated as a general rule that a party to a written contract may not contradict the terms of the contract by parol; that a defendant in an action on a note, unconditional in its terms, can not show by parol, even as against the payee, that the parties had an understanding that the contract was in fact conditional, and further, that an agreement that the note in

collegially that the transaction involved in the \$10,000 note in question was a loan by the bank of that amount of money to Jewell. Contingencies which agreement with the bank as to the ultimate security for the condition of the note are not available as a defense to defeat a recovery in accordance with the terms of the note signed by him and the defendant defendant as security debtor.

Under the evidence given on the trial and the undisputed facts appearing in the record, the plaintiff would not be required to establish the fact that the transaction between him and the bank was a loan of money and not a gift. The bank's evidence would be sufficient to establish the fact that the object which was desired and intended to be effected by all the parties in interest, which was to make good the plaintiff's note, and would in effect result in a loan from the bank's assets. The plaintiff was made up by the bank's assets under the direction and with the consent of the bank of people's resources, in faith of which the bank was allowed to continue to do business, and in so doing Jewell clearly voluntarily gave his name of the responsibility, which if the bank had been allowed at that time he might have been compelled to do by action in the courts.

In Smith v. Jones et al., 100 Ill. App. 2d 11, it is stated as a general rule that a party is not entitled to recover any net contracted the form of the contract by which the plaintiff is in action on a note, notwithstanding the fact that the bank was not the party, even as against the bank, that the parties are as understanding that the contract was in fact made, and further, that in agreement that the note is

question was not to take effect until sufficient dividends had been declared upon the shares of stock in consideration of which the note was given, to amount to the face value of the note, with interest, did not make the delivery of the note, but merely its payment conditional, and consequently parol proof would not be received to contradict the express terms of the note. First National Bank v. Holsen, 245 *ibid.* 75.

In Stern v. Mc Donald, 190 Pac. 221, it is said:

"The conceded purpose for which the sale was made and the note given was that the bank might be allowed to continue business. There was an impairment of the bank's assets, for which the bank could have been closed, and in order to relieve that embarrassment and to insure the bank's continuance in business the directors, at the direction of the superintendent of banks, purchased said bonds and executed said note. This was done to bring up the amount of the bank's depreciated capital to the standard fixed by the superintendent of banks. That of itself constituted a valuable consideration for the note. It has been held by numerous authorities that a note or bond, executed by the directors of a bank to make good an impairment of the bank's assets, so that the bank may continue in business, is based upon a valid consideration. Skordal v. Stanton, 89 Minn. 511, 95 N. W. 449; First Nat. Bank v. Felt, 100 Iowa 680, 69 N. W. 1057; Hurd v. Kelly, 78 N. Y. 588, 34 Am. Rep. 567; Murphy v. Gumaer, 18 Colo. App. 183, 70 Pac. 800; Nat. Bk. of Salt Lake City v. Nelson, 38 Utah, 169 *Ill. P. ac.* 907."

This is a pertinent authority as applied to the controversy in the instant case. A quite recent case of State Bank of West Pullman v. Hovnanian, 250 *Ill. App.* 144, is on fact and legal principle in all of its controlling features analogous to the case at bar. It involves the same contention under comparatively similar conditions to that of the case at bar. It involves a note given by a director of the bank with others for the purpose of making good the worthless paper, a part of the assets of the bank. What was done

was done under the direction and supervision of the State Auditor of Public Accounts, and it was given for the purpose of making good the depreciated assets of the bank. In that case the facts and the law are stated in extenso, and the transaction there involved was under the direction of the same individual officers as took part in the attempt to make good the deficiency found by the Auditor of Public Accounts in the assets and stock depreciation of the State Commercial & Savings Bank. There it held, as we hold here, that a note given to the bank by one of the directors is not subject to the defense that it was without consideration and for accommodation, when it was one of several notes executed voluntarily by the directors as individuals to make good an impairment of the bank's assets, due to the inclusion therein of certain worthless paper, and when each of the notes of such directors was delivered, accepted and thereafter included among the bank's assets unincumbered by any condition as between the parties thereto. It was further held that a note given to a bank by a director thereof to make good an impairment of its capital and thus restore it solvency and avoid the necessity of levying an assessment against the stockholders, is given for a valid consideration.

The finding of the chancellor finds ample support in the pleadings and the evidence, and the dismissal of the bill for want of equity was without error.

This case was heard and decided when Mr. Justice Taylor was a member of the court. His successor, Mr. Justice Ryner, took no part in the hearing of the decision of the case.

was some order the attention and supervision of the State
Director of Public Health, and it was given for the purpose
of making good the deplorable state of the work. In that
case the facts and the law are stated in REMARKS, and the
recommendation there involved was under the direction of the
State Industrial Commission as that part in the report is given
Good the following found by the Director of Public Health
in the course and under supervision of the State Commission
a similar fact. There is said, as we have seen, that a note
given to the work by one of the directors is not subject to
the fact that it was not a commission and the answer
given, that it was one of several notes sent out voluntarily
by the directors as individuals to make good an incident at
the public health, but in the industrial branch of health
and under the work of the State at that time
was not only, accepted and approved by the State
Director of Public Health as a commission as before the
public health. It was further said that a note given to
a part of a director should be made good as indicated in its
context and that it was not a commission and that the industrial
at making an agreement against the industrial, is given
for a well consideration.

The Director of the Commission of the State
in the health and the industrial, and the Director of the
Bill the work of the State was a well known.

That was the first and last of the industrial
Director and Director of the work. The Commission, the Director
of the work in the health and the industrial of the
State.

Complainants counsel has violated Rule 18 of this court in abstracting the record. Instead of abstracting the bill it is set forth verbatim. Counsel make no attempt to conceal their conduct in this regard. It reads "Bill of complaint filed in words and figures as follows." The same is true of the answer of defendant. The rule requires " a complete abstract or abridgement." The abstract filed does not fill this requirement.

The rules of the court are binding upon all the parties including counsel and also the court and should be fairly observed. No one is privileged to violate them, not even the court. In the condition of the abstract before us the court would have been justified, on its own motion, to have stricken the same from the record. Failing so to do must not be taken as condoning the breach.

The decree of the Circuit Court dismissing plaintiff's bill for want of equity is affirmed.

AFFIRMED.

WILSON, J., Concurs,

RYNER, J., not participating.

Consequently counsel has stipulated that it is not
worth in obtaining the record. In view of the fact
the bill is not yet introduced. Counsel made an effort
to secure the record in this regard. It would be
convenient filed in words and figures as follows. The same
is given at the request of defendant. The rule requires a
certain degree of explanation. The plaintiff filed again
but still this requirement.

The rules of the court are binding upon all the
parties including counsel and also the court and shall be
strictly observed. No one is permitted to violate them, and
even the court. In the execution of the court's duty to
the court shall have jurisdiction, in the court's action, to
have within the court from the court. Filing as to be
must not be taken as violating the rules.

The issues of the Circuit Court concerning plaintiff's
bill for cost of service is allowed.

ATTORNEY.

STEWART, J., COUNSEL.

RECEIVED, J., and participating.

35 - 32767

J. FRANK LINDSEY, Doing
business as Lindsey Company,

Appellee,

v.

LOUIS ROSEN,

Appellant.

6967
250 I.A. 538⁴

APPEAL FROM

CIRCUIT COURT

DOCK COUNTY.

Opinion filed Nov. 7, 1928.

MR. PRESIDING JUSTICE HOLCOM delivered the opinion
of the court.

This is an action of assumpsit in which plaintiff filed his amended declaration October 25, 1926, in the first count of which is the claim that defendant was indebted to plaintiff in the sum of \$5,000 for labor and services before that time done and bestowed in and about the business of the defendant at his request. Likewise plaintiff filed the common counts. Plaintiff on the order of court, made on the motion of defendant, filed a bill of particulars in which inter alia it was stated, that plaintiff's claim was for a commission of \$650 due and owing to plaintiff from one Frishman, which was collected by defendant and retained by him; also \$325 for a commission due to plaintiff from one Ritter, which was collected and received by defendant; also for a commission of \$1,000 which was due and owing to plaintiff from one Barnett, which was collected and received by defendant; also a commission of \$1,000 due and owing to plaintiff from one Elbloom, collected and received by defendant; also for a commission of \$500 due and owing to plaintiff from one Ryan, collected and received by defendant; also a commission of \$600 due and owing to plaintiff from one Tobin, collected and received by defendant; also for

a commission of \$650 due and owing to plaintiff from one Lock & Fersel, collected and received by defendant, making a total sum of \$4,675, upon which the plaintiff would allow defendant a credit of \$1,000, advanced to him by defendant on or about January 1, 1925, leaving his net demand of \$3,675 with interest from January 15, 1925.

Defendant interposed a plea of the general issue with an affidavit of merits, denying any of the indebtedness whatsoever to the plaintiff. There was a trial before court and jury, which resulted in a verdict in favor of the plaintiff, with damages assessed against defendant at the sum of \$4341.50. A motion for new trial was overruled as well as a motion in arrest of judgment, and the judgment on the verdict for the amount thereof entered against defendant, from which defendant prayed and perfected this appeal. A bill of exceptions was approved and signed by the judge presiding at the trial and filed on April 4, 1928.

In this court plaintiff makes a motion to affirm the judgment for a lack of a bill of exceptions in the transcript of the record, and defendant by leave of court, granted upon his own motion, filed herein an additional record. This additional record shows that on April 20, 1928, on the motion of plaintiff, the Circuit Court ordered that the bill of exceptions "be and the same is hereby expunged from the record and stricken from the files", to which order defendant excepted and prayed an appeal to this court, which was allowed. Upon that motion defendant filed its bill of exceptions in which it appears that Charles F. Malthrop, the attorney for plaintiff, filed his affidavit to support his motion to expunge from the record the bill of exceptions which theretofore been filed, in which

a commission of \$1000 was paid to Plaintiff from the
Bank of Montreal, collected and received by Plaintiff, making a
total sum of \$10,000, upon which the Plaintiff would have
defendant a credit of \$1,500, advanced to him by defendant on
or about January 1, 1925, towards his net amount of \$1,500
with interest from January 1, 1925.

Defendant introduced a list of the several items
which are alleged to have been, during the time of the commission
expended on the Plaintiff. There was a total of \$10,000
and \$1,500, which was paid in a number of items of the Plaintiff,
with charges assessed against defendant at the sum of \$1,500.
A motion for the trial was returned on all of the items in
answer to judgment, and the judgment on the trial for the
amount thereof entered against defendant, from which defendant
appealed and introduced this appeal. A bill of exceptions was
prepared and signed by the judge presiding at the trial and
filed on April 4, 1926.

In this case Plaintiff makes a motion to enter the
judgment for a bill of exceptions in the following
of the account, and defendant by leave of court, presented some
and certain, filed herein as additional account. This additional
account shows that on April 20, 1925, on the order of Plaintiff,
the Plaintiff Court ordered that the bill of exceptions be
the same as being returned from the court and signed from
the Clerk, so that order defendant's account was signed on
appeal to this court, which was allowed. From that motion
defendant filed the bill of exceptions in which it appears that
Section 1, Plaintiff, the Plaintiff for Plaintiff, filed his
affidavit to support his motion to enter the account on
bill of exceptions which Plaintiff has filed, in which

inter alia, the following facts were stated:

That one Jacob H. Jaffe on March 15, 1938, one of the attorneys for defendant, delivered to affiant a "stenographic report or partial bill of exceptions" in said cause, and further stated that he partially examined said document and discovered that the said report or proposed bill of exceptions did not contain all of the evidence, in that it did not contain any exhibit offered on the trial of said cause; that on or about the 21st of March, 1938, a representative of said Jaffe called upon affiant and requested the return to him of the bill of exceptions that the same might be completed; and further states that at the time he had not examined to exceed one-third of the proposed bill of exceptions; that he advised the representative of said attorney for defendant that said bill of exceptions was not complete, and that he had inserted a slip of paper in said bill of exceptions where documentary evidence was missing and requested the return thereof when the attorneys for defendant had completed the compilation of the same; and further stated that on the 3rd day of April, 1938, said Jaffe called at his office with the stenographic report and proposed bill of exceptions and stated to him that he desired to take the same to the Honorable David M. Brothers, trial judge, and have him mark the same as "presented", so that defendant would have sufficient time to properly prepare and complete the said document; and further states that he glanced through the bill of exceptions on the 3rd of April, 1938, and found no exhibits attached thereto, and that none of the exhibits now appearing in the bill of exceptions was attached thereto; that affiant relying upon the statement of said Jaffe that he desired to have the bill of exceptions marked "presented" did not attend court pursuant to the notice they served upon him, affiant believing and expecting

These bills, the following facts were stated:

That on March 11, 1901, at New York, N. Y., and at the
attorney for defendant, believed to be a "reputable"
person in regard to his reputation, in this case, and that
defendant had no personal knowledge of defendant and his
that the bill report of defendant of defendant did not con-
tain all of the evidence, in that it did not contain any matter
related to the bill of defendant, that on or about the 11th
of March, 1901, a representative of said bill called upon defendant
and requested that he be of the bill of defendant that
the same might be considered and further stated that at the time
he had not intended to amend any-kind of the proposed bill at
all, and that the representative of said bill was
defendant; that he advised the representative of said bill
for defendant that said bill of defendant was not amended, and
that he had received a bill of defendant in said bill of defendant
these statements were also made and requested the return
thereof from the attorney for defendant had completed the same.
After all of the same, and further stated that on the 11th day of April,
1901, said bill called at his office with the representative
thereof and presented bill of defendant and stated to him that he
intended to take the same as the honorable house of New York, and
judge, and gave him, said the same representative, so that defendant
and would have believed that he properly received and accepted
the said bill; and further stated that he believed through the
bill of defendant on the 11th of April, 1901, and found no evidence
related thereto, and that none of the evidence was submitted in
the bill of defendant was amended therewith that said bill
upon the statement of said bill that he desired to take the bill
of defendant under "provisional" and said bill was submitted
to the Senate they passed upon him, without believing and receiving

that before said bill of exceptions was signed, sealed and filed in said cause he would have, as is customary at the Chicago Bar, a reasonable opportunity to examine and approve the same. He further states that on the 19th day of April, 1928, one F. G. Levy, a representative and employee of Jaffe & Green, attorneys for defendant, called upon affiant at his office and procured from him four exhibits and gave to affiant his receipt therefore, setting said receipt out in habeo verba; that the said Levy advised affiant that the bill of exceptions could not be completed until the exhibits had been procured; and further states that the exhibits taken from his office on April 19, 1928, and the contents thereof were not known to the said defendant or his counsel, and could not been known to them, and the representative of defendant's counsel stated to affiant that they had no such documents and would require the use of the originals for the purpose of putting the same in the bill of exceptions, and further that said exhibits, as set forth in the receipt, now appear in the bill of exceptions, setting forth in what portions of the bill of exceptions they do appear.

On said motion defendant exhibited to the court the notice served upon the attorney for plaintiff with his acceptance of the receipt thereof written thereon, and likewise a stipulation signed by the attorneys of the parties that the original bill of exceptions, in lieu of a copy, may be incorporated in the transcript of the record for appeals to the Appellate and Supreme Courts of the State of Illinois, and there is also set forth a colloquy between court and counsel on the hearing of the motion to expunge the bill of exceptions from the record. The foregoing two motions were reserved to the hearing of the cause.

that before this bill of exceptions was signed, sealed and
filed in said court in said date, in its testimony as the
Chicago bar, a responsible expert in reading the records
the same, as further stated upon the 15th day of April, 1905,
and F. M. Levy, a representative and collector of said A. Levy,
attorneys for defendant, called upon witness at his office and
presented from his own records and gave to witness his copies
thereof, witness said records and in said date that the said
Levy attested witness that the bill of exceptions would not be
submitted until the witness had been subpoenaed and further stated
that the witness knew from his office on April 15, 1905, and
the contents thereof were not known to the said witness as
his counsel, and would not have known in that way the
contents of defendant's counsel stated to witness that they had
no such subpoena and could furnish the name of the witness
the witness he believed the name in the bill of exceptions,
and further that said witness, as set forth in the record, was
appeared in the bill of exceptions, stating that in that position
of the bill of exceptions they in effect.

On said date witness testified to the court the
witness stated upon the testimony for plaintiff that his attention
at the time of the hearing of the bill of exceptions was directed
to the contents of the records that the witness bill of
exceptions, in line of a copy, may be introduced in the record
copy of the record the copies of the records and witness
copies of the bill of exceptions, and there is also set forth a
copy of the bill of exceptions and copies of the records of the witness
to examine the bill of exceptions from the record. The testimony
was given with reference to the hearing of the same.

While an appeal was prayed from the entry of the order expunging the bill of exceptions from the record, none was perfected. Furthermore there are no assignments of error upon the record originally filed or the supplemental record filed on motion of defendant challenging the action of the trial court as error in expunging from the record the bill of exceptions previously approved by the judge and filed in the cause.

There being no bill of exceptions in the record the action of the court in expunging from the record the bill of exceptions is not before this court for decision on this appeal.

An examination of the record discloses no error of the trial court in the common law record. In the condition in which we find this record, the action of the trial court in expunging the bill of exceptions from the record, after the approval thereof, is not before us for decision. As there is no evidence before us to the contrary we will assume that the trial judge's action in expunging the bill of exceptions from the record was without error. It therefore follows that the motion of plaintiff to affirm the judgment, reserved to the hearing, must be allowed, and heeding such motion the judgment of the Circuit Court is affirmed.

AFFIRMED.

WILSON, J., CONCURS.

TAYLOR, J., not participating.

83 - 32817

GEORGE A. LAGESCHULTE,
Appellant,

v.

NATIONAL TEA COMPANY,
a corporation,
Appellee.

6968a
250 I.A. 639'

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Nov. 7, 1928.

MR. PRESIDING JUSTICE HOLDON delivered the opinion
of the court.

This is an action for rent under a written lease executed between the parties, plaintiff and defendant, in which the plaintiff demise a certain store in a building located at the corner of Cook Street and Park Avenue, Barrington, in the State of Illinois; the term granted by the lease was from the first day of October, 1922 to the 30th day of September, 1927, with rental at the rate of \$75 per month.

It is not disputed but that defendant stayed in the premises after the expiration of its lease and until January 6, 1928. The lease contained a provision that at its termination by lapse of time or otherwise, defendant would yield up immediate possession to the landlord, and on failure so to do would pay as liquidated damages for the whole time possession should be withheld the sum of \$5.00 per day, and further that the defendant tenant agreed to pay and discharge all reasonable costs, attorney's fees and expenses which should be made and incurred by the landlord in enforcing the covenants of the lease, etc.

2501A.633

LEGAL TOWN

RECEIVED

NOV 1938

87 - 1017

WILLIAM A. LAMBERT

Attorney

at

STANDARD OIL COMPANY

of Indiana

Indy, Ind.

Opinion filed Nov. 7, 1938.

MR. JUSTICE BRIDGES delivered the opinion

of the court.

This is an action for recovery of a certain sum

of money between the parties, plaintiff and defendant, in

which the plaintiff claims a certain sum in a certain

portion of the money of the estate of the late Mrs. Mary

and, in the case of the estate, the sum claimed by the

plaintiff is the sum of \$10,000, less the sum of \$2,000

paid, and the sum of \$8,000, less the sum of \$2,000

It is not claimed that the defendant is the

plaintiff's attorney and that the sum of \$2,000 is

due to the plaintiff. The plaintiff claims that the

sum of \$10,000 is due to the plaintiff, and that the

sum of \$2,000 is due to the plaintiff, and that the

sum of \$8,000 is due to the plaintiff, and that the

sum of \$2,000 is due to the plaintiff, and that the

sum of \$8,000 is due to the plaintiff, and that the

sum of \$2,000 is due to the plaintiff, and that the

sum of \$8,000 is due to the plaintiff, and that the

sum of \$2,000 is due to the plaintiff, and that the

Indy, Ind.

Plaintiff sought to recover the rental for occupation after the termination of the lease in accordance with its terms the sum of \$5.00 per day, and likewise the sum of \$50 for reasonable attorney's fees for prosecuting the action, which together make the sum of \$540. Defendant insisted that it was only liable to pay the reasonable rental value of the premises during the time that it held over after the expiration of the term granted. The cause was submitted to the court for trial without a jury, and the trial judge took the view of the defendant and entered judgment against it for the sum of \$240 and costs, and defendant brings the record to this court for review, asking for a reversal of that judgment and a judgment here for the sum of \$540, the amount of the rent at \$5.00 per day and \$50 for reasonable attorney's fees.

We think it clear that the court took the wrong view of the rights of the parties under the lease. The lease provided for the contingency which happened of defendant holding over after the expiration of the term with reasonable attorney's fees. These rights are contract rights and the written lease governs the rights of the parties. The question was not before the court as to the reasonable rental value of the demised premises, that the parties had agreed to in a manner which the law recognizes. The \$5.00 a day was for liquidated damages for the wrongful holding over after the expiration of the term, and there being no evidence in this record of any fraud or circumvention, or that the per diem rental is unconscionable or disproportionate to the damages sustained, plaintiff had a right to recover that amount as liquidated damages for defendant's breach of the lease in so holding over. This question

plaintiffs sought to recover the rental for services

from after the termination of the lease on September 27th.

The terms of the lease of \$10.00 per day, and likewise the sum of \$10.00 per day, were the same as the terms of the lease, but the defendant's attorney's fees for representing the parties.

which together with the sum of \$10.00, defendant claimed.

That it was only liable to pay the reasonable rental value of

the premises during the time that it held them after the ex-

piration of the term provided. The court was satisfied on the

amount for trial without a jury, and the trial judge found the

view of the defendant and returned judgment against it for the

sum of \$10.00 and costs, and defendant claims the rental as

this would be correct, making for a total of \$10.00 judgment

and a judgment for the sum of \$10.00, the amount of the

sum of \$10.00 per day and the reasonable attorney's fees.

It is clear that the court found the rental value

of the premises at the parties under the lease. The court con-

cluded for the defendant which judgment of defendant holding

even after the expiration of the term and reasonable attorney's

fees. These rights are subject to the rights of the parties

against the rights of the parties. The question was not before

the court as to the reasonable rental value of the premises

provided that the parties had agreed to in a written lease for

the premises. The \$10.00 a day was the stipulated amount for

the premises during every other the expiration of the term,

and there being no evidence to the contrary of any other sum

otherwise, so that the sum of \$10.00 is reasonable

as compensation for the services rendered. Plaintiff has a

right to recover that amount as stipulated amount for the

use of the premises as to the rental. This finding

has been decided in favor of this contention by this court in Farley v. Knight Light & Soda Fountain Co., 223 Ill. App. 317; Poppers v. Meagher, 148 Ill. 192; Farker Washington Co. v. Chicago, 267 *ibid.* 136. As to the question of attorney's fees, there is nothing in the record to justify us in holding that \$50 was unreasonable.

It is true that defendant sent three checks to the plaintiff covering the rental for the time it held over after the expiration of the term at the monthly rental rate recited in the lease, and while these checks were received by plaintiff they were never cashed and were returned to the defendant. This did not work an estoppel, and there is no evidence of any other act on the part of plaintiff which it is contended would work an estoppel. The burden of showing an estoppel was upon the defendant, and this should be by a preponderance of the evidence. Stanley v. Marshall, 308 Ill. 30.

While it appears that there were negotiations between the parties for a renewal of the term, it also appears that the parties were unable to agree upon a rental, and all such negotiations proved abortive. Defendant has no lawful excuse for holding over after the expiration of the term granted by the lease. Such holding over was of defendant's own volition and it must pay therefor at the rate named in the lease for so doing. The question of quantum meruit of the rental value of the premises after the expiration of the lease, was not the proper measure of damages. The parties were bound by their contract. By such contract their rights must be adjudicated.

has been decided in favor of this contention by this court
in Ellis v. United States & Lake Superior, 100 Ill. 402.
115; Turner v. Wheeler, 148 Ill. 120; Turner v. Wheeler,
150 Ill. 402. 120. As to the question of attorney's
fees, there is nothing in the record to justify an award
that the law requires.

It is true that defendant was given notice in the
plaintiff's petition that the case is held over until
the expiration of the term of the weekly rental was expired in
the record, and while these things were received by plaintiff
they were never acted upon and were returned to the defendant. This
did not constitute an answer, and there is no evidence of any
effect on the part of plaintiff which is contained in the
record. The burden of showing an answer was upon the
defendant, and this should be by a preponderance of the evidence.
Ellis v. Wheeler, 100 Ill. 402.

While it appears that there were negotiations between
the parties for a period of time, it also appears that the
parties were unable to agree upon a rental, and all such nego-
tiations proved abortive. Defendant has no legal excuse for
failing to enter the expiration of the term fixed by the
lease. When plaintiff was not at defendant's own service and
it was not material to the case in the issue for so
being. The question of attorney's fees is the only one of
the parties after the expiration of the lease, and not the
proper parties to the case. The parties were bound by their
contract. If such contract their rights must be adjusted.

- 4 -

For the errors above pointed out the judgment of the Municipal Court is reversed, and we will do here what that court should have done, and enter a judgment in favor of plaintiff for \$540 with the costs of the cause both here and below.

JUDGMENT REVERSED AND JUDGMENT
HERE FOR PLAINTIFF FOR \$540.00.

WILSON AND TAYLOR, JJ., CONCUR.

• 100 •

68 - 32544

250 I.A. 639²

WILLIAM J. KLISANOW, doing
business as the INDEPENDENT
REALTY EXCHANGE,

Appellee,

v.

DAVID DON,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed November 7, 1928.

MR. JUSTICE TAYLOR delivered the opinion of the
court.

This is an appeal by David Don, the defendant, from
a judgment of the Circuit Court in the sum of \$1,185.00, on
a verdict in favor of the plaintiff, William J. Klisanow,
doing business as Independent Realty Exchange, and against the
defendant, David Don, for commission on a real estate deal.

For reversal, on behalf of the defendant David Don,
it is claimed (a) that the evidence failed sufficiently to
show that the plaintiff was employed by the defendant; (b)
that the plaintiff was not the efficient and procuring cause
of the trade; (c) that there is no competent evidence in the
record to show that the defendant agreed to pay the plaintiff
a commission of 3 per cent of the price he obtained for the
premises; (d) that there is no competent evidence in the record
to show what was the usual and customary commission for ser-
vices rendered by the plaintiff, if any such services were
rendered; (e) and that a certain instruction given on behalf of
the plaintiff was erroneous.

There was evidence on the part of the plaintiff tending to show the following: - That in March, 1924, he, the defendant, listed certain real estate with one Stein, a salesman employed by the plaintiff, Klibanow; and told Stein that he, the defendant, had a building at Crawford and 13th Street which together with some cash, he would like to trade for a larger building; that Stein interested one Max Grossinger in the defendant's property; that about September 15, 1924, Stein showed Grossinger the defendant's property, which consisted of a store and five flats and a vacant lot next door; that Grossinger asked the price and he told him it was listed at \$45,000.00; that Grossinger said that the price of his building was \$160,000.00; that Stein then saw the defendant and told him of his conversation with Grossinger, and took him, the defendant, to Grossinger's building, and spent some hours there looking it over, that the defendant said the price was too high, that the building was not worth more than \$150,000.00; that he, Stein, arranged an appointment with the defendant and Grossinger at his, Stein's, office; that about September 17 or 18 they came to his office and he introduced them to each other; that a conversation then took place which lasted about three-quarters of an hour; that Grossinger came down on his price to \$155,000.00, with the provision that the defendant's price would be \$42,500.00, that Grossinger stated that his brothers were partners in the building, and that before he could state a definite contract price, he would have to consult his brothers; that Grossinger said, "I also have the power to sell and can do as I see fit, but I owe it to them to talk to them;" that the defendant said, "All right, let Mr. Stein know as soon as you have talked to your brothers, and I am

There was nothing in the way of the building
 standing in the way of the building - that is, in 1904, the
 building, listed under the name of the State, was
 known as the building by the building, and that the
 first of the building, was a building of the building and that
 across the building with some work, he would like to see
 for a larger building that this building and the building
 in the building's building, that about building in, 1904,
 State about building the building's building, which was
 listed at a price and five years and a month and two years
 that mentioned about the price and he told him it was listed
 at \$10,000.00; that mentioned that the price of the
 building was \$10,000.00; that this was the building
 and told him of his conversation with building, and that the
 the building, to building's building, and that some years
 there building it over, that the building with the price was
 for \$10,000.00; that the building was not with some \$10,000.00;
 that he, building, although no building with the building and
 mentioned of his building's building, that about building it in
 is they were to the office and he mentioned that he was
 about that a building that had been about building about
 five-years of or about that building was then in his
 given to \$10,000.00, and the building that the building's
 price would be \$10,000.00, that building about and the
 building was building in the building, and that before he
 told that a building building, he was, he was in building
 his building that building was, "I also have the price to
 sell and not to be 1 the 1st, but I was it to him to sell to
 him," that the building said, "I will right, for the building
 him to come on the price to your building, and I am

ready to go through with the contract;" that Grossinger said, "Now about the commission, how much commission on this deal?" that he, Stein told him, on the trade the regular commission of 3% should be paid by each one of the owners; that nothing further was said on that subject; that several days later, Stein talked to Grossinger on the telephone, and asked him when they were going to make the contract; that Grossinger replied that it was his busy season and that he didn't get a chance to talk to his brothers yet; that three or four days later, he again talked with Grossinger on the telephone; that he also called the defendant at the same time, and repeated to him what Grossinger said; that he called up Grossinger ten or twelve times during the next two months, and the last time he talked to the defendant over the telephone was after he spoke to Grossinger, and Grossinger had said he decided he didn't want the property; that he, Stein, then called the defendant, and the defendant said, "I don't think I am interested in the deal;" that about thirty days later, he saw an item in the morning paper about a real estate transaction between the defendant and the Grossingers; that he called the defendant to his office and told him that he, Stein, was the man who brought the deal to him, and the defendant said, "That was three months ago, I could make the deal without you;" that then he, Stein, said, "Now about my commission?" that the defendant said, "It wasn't necessary for you to work on it."

The evidence further showed that the defendant traded his building to the Grossingers on December 30, 1934, and that he received \$39,500.00 for the building, in trade, and paid Grossinger \$150,000.00.

ready in the morning with the committee. That Wednesday night
"I was about the committee, but some questions on this matter"
that he, this told him, on the table the regular committee
of 15 should be held by each one of the members; that nothing
further was said on that subject; that several days later,
Hester called on Hester on the telephone, and asked him
when they were going to hold the meeting; that Hester
replied that it was his busy season and that he didn't get a
chance to talk to his brother; that Hester on the 15th
later, he again called on Hester on the telephone; that
he also called the defendant at the same time, and repeated to
him that Hester's wife; that he called on Hester on the 15th
again during the next two months, and the last time he
called on the defendant was the telephone was after he spoke
to Hester, and Hester had said he didn't want to
want the property; that he, this, then called the defendant,
and the defendant said, "I don't think I am interested in the
deal." That about thirty days later, he saw on him in the
morning about a year before the transaction between the de-
fendant and the Hester; that he called the defendant at
his office and told him that he, this, saw the son and daughter
the day he was, and the defendant said, "That was about twenty
ago, I could not find without you." That from the 15th,
said, "I was about the committee" that the defendant said, "I
wasn't necessarily let you to work on it."

The witness further stated that the defendant called
his mailing to the committee on November 20, 1934, and that
he received the \$50,000 for the mailing, in funds, and paid
thereafter \$100,000.

It is the theory of the plaintiff that he produced a purchaser ready, willing and able to make a "deal" for the property owned by the defendant, on terms which were satisfactory to him; that the defendant did, accordingly, make an exchange of real estate with the purchaser so procured by the plaintiff, and that the plaintiff was, therefore, entitled to a commission of 3% of the purchase price.

The defendant's theory of the case is that the plaintiff did not procure Max, Sam and Jacob Grossinger to make the trade for the real estate owned by the defendant; that the defendant had known the purchasers long before the transaction in question was consummated, and that the defendant had procured the purchasers himself and had negotiated with them and consummated the deal himself without the services of the plaintiff; that the plaintiff did nothing whatever in procuring a customer or rendering any services in consummating the trade with him, the defendant, and the Grossingers.

There was considerable controversy in the evidence as to the ownership of the property. Max Grossinger testified that he never met Stein or Klibanow; that he owned the building in question; that he never met either of them before he traded his building; that he was never in their office, and never listed his property with them; that the first time he ever saw Stein in his life was in Judge Eagleton's court room last year; that he never saw Klibanow before that time.

It is urged for the defendant that the plaintiff's witnesses did not tell the truth, and that, therefore, the verdict of the jury was wrong. While the evidence as disclosed

by the record, shows many contradictions, it was submitted to the jury, and the jury found for the plaintiff. In our opinion there is ample evidence in the record to justify the verdict, and, in any event, this court would not be justified, considering what the record discloses, in overriding the verdict of the jury. They saw the witnesses; we did not.

There is some evidence that the building taken over by the defendant was owned by Max, Sam and Jacob Grossinger, but the evidence on that subject was contradictory and involved a controverted question of fact which the jury decided in favor of the plaintiff.

In our judgment, there was ample evidence in justifying the jury in holding that Max Grossinger had authority to dispose of the property, and that the plaintiff was the efficient and procuring cause of the exchange.

Counsel for the defendant, to support the defendant's contention that the plaintiff was not the procuring cause of the trade, have cited in their brief, among others, the following cases:

Stone v. Ferry, 144 Ill. App. 181
Dickson v. Owens, 134 Ill. App. 351;
Wentworth v. Mann, 178 Ill. App. 351;
Neufeld v. Oren, 80 Ill. App. 330;
Hafner v. Herron, 165 Ill. 243.

We have examined them, but do not find any of them counter to the conclusion we have reached.

As to the commission of 3%, there is evidence that Grossinger asked, "How about the commission?" and that Stein replied, "In the trade the regular commission of 3% to be paid

by each one of the owners," and that they (meaning the defendant and Grossinger) made no response. As no objection to the commission was made and the exchange was subsequently made, it must be inferred from that evidence that the defendant was satisfied to pay a commission of 3%, and that the plaintiff was entitled to assume that that was the understanding.

Counsel for the defendant criticize an instruction given at the request of the plaintiff; objecting to it because it contained the following: "and if you believe from a preponderance of the evidence that the defendant promised to pay to the plaintiff a commission of 3% upon the price to be received from such purchaser or purchasers for said real estate of the defendant," and claiming that those words tended to mislead the jury. It is our opinion, however, that the error, if any, is not sufficient to justify a reversal.

For the foregoing reasons the judgment will be affirmed,

AFFIRMED.

HOLDOM, P.J. AND WILSON, J. CONCUR.

by each one of the witnesses, and that they (meaning the for-
feited and commiserated) were no witnesses. It is objected
to the affidavit that it is not the evidence and immaterially
more. It must be inferred from that evidence that the witness
and was entitled to pay a commission of \$1,000 and that the
affidavit was entitled to receive that sum for the commission.

Second for the defendant's evidence on the issue of
claim at the request of the plaintiff's evidence as it appears
it contained the following: That if you believe from a per-
son's own evidence that the defendant's evidence is not
in the plaintiff's commission it is not the case as to
feared from each witness by defendant the same was paid
of the defendant, and stating that there was no finding in
against the pay. It is not correct, however, that the error
it may, is not sufficient to justify a reversal.

For the foregoing reasons the judgment will be

affirmed.

REVEREND

NOTED, J. A. AND OTHERS, A. M. 1888.

77 - 32853

69 70
250 I.A. 639³

IRMA FAY VANNIER,

Appellee,

v.

RAOUL VANNIER,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed November 7, 1928.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On August 9, 1927, in the Superior Court of Cook County, on motion of the solicitors for the complainant, and due notice to the defendant, an order was entered that the defendant, Raoul Vannier, pay to the complainant for the support of herself and three minor children the sum of \$30.00 a week, the first payment to be made on Monday, August 15, 1927, and a like sum of \$30.00 on Monday of each week thereafter, and that he pay to the complainant for her temporary solicitor's fees the sum of \$200.00 to be paid \$100.00 in ten days and \$100.00 in thirty days from the date of the entry of the order.

On October 7, 1927, the complainant, Irma Fay Vannier filed a petition in which she alleged, among other things, that the defendant had neglected and refused to pay the \$30.00, on August 15, 1927, or to pay any other sum of money since the entry of the above mentioned decree, except the aggregate sum of \$45.00, and that the defendant had neglected and refused to pay to the complainant any moneys for her solicitor's fees, and that there was then due at the time of filing the petition \$135.00 for the maintenance and support of her

Vanier filed a petition in which she alleged, among other things, that the defendant had neglected and refused to pay the \$10,000, or, alternatively, to do so by any other sum at least since the entry of the above mentioned decree, except the aggregate sum of \$12,000, and that the defendant had neglected and refused to pay to the complainant any money for her maintenance, and that there was then due at the time of filing the petition \$10,000 for the maintenance and support of her

children, and \$200.00 solicitor's fees, making in all \$395.00. She prayed in her petition that the respondent, Raoul Vannier be ordered to appear and show cause why he should not be adjudged in contempt of court.

On October 7, 1927, an order was entered that the defendant show cause on October 14, 1927.

On October 14, 1927, the respondent filed an answer.

On December 6, 1927, an order was entered which after setting forth that the parties were present in court and that evidence was heard, and that the defendant was in arrears in the sum of \$195.00, which he wilfully refused to pay, and that no cause being shown to the court, either by answer to the petition or in open court, why he neglected and refused to pay, and after he was found and adjudged guilty of contempt of court - decreed that he be adjudged in contempt of court for failure to pay arrears of moneys in the sum of \$195.00; that he be committed to the County jail of Cook County, there to remain charged with said contempt for a period of not to exceed six months, or until he paid the sum of \$195.00 into court, or until released by due process of law, and that a warrant for his commitment issue forthwith, directed to the sheriff of Cook County, Illinois, to execute. This appeal is by the defendant, Raoul Vannier, from that order.

In a certain original proceeding, out of which this controversy arises, the complainant filed a bill for divorce, which bill was dismissed by order of court on April 29, 1925, for an alleged want of jurisdiction, it being contended

that the complainant had, prior to that, instituted proceedings under the non-support act in the Municipal Court of Chicago, and had there obtained an order for the payment of \$25.00 per week for her support. An appeal from the order of dismissal was taken to the Appellate Court. The order of dismissal was there reversed and the cause remanded.

On August 1, 1927, an order was entered in the Superior Court reinstating the cause on the calendar of that court. Following that, on August 9, 1927, the order of court mentioned above directing the defendant to pay to the complainant \$30.00 a week, and to pay certain solicitor's fees was entered.

It is contended on behalf of the defendant that the order for alimony was void for want of jurisdiction, and that, consequently, he was not in contempt; also, that the order adjudging him guilty was void, because informal, illegal and insufficient.

In our opinion, the court had both jurisdiction of the parties and the subject matter of the proceeding at the time of the entry of the order of August 9, 1927, that the defendant pay temporary alimony and support money for the children. Both the complainant and the defendant were in court, and apparently, upon an affidavit of the complainant and on the evidence heard in open court, it was found that the court had jurisdiction of the parties and the subject matter, and that the defendant was financially able to support his wife and children.

that the defendant had, prior to that, instituted proceedings against the non-suspect and in the meantime, about at Chicago, and had some evidence on which the return of \$10,000 was made for the return. An appeal from the return of \$10,000 was taken to the Supreme Court. The order of dismissal was there returned and the same returned.

On August 1, 1907, an order was entered in the Supreme Court dismissing the return in the amount of \$10,000. Following that, on August 2, 1907, the return of \$10,000 was entered. The defendant was then taken to the Supreme Court and the return of \$10,000 was there returned.

It is contended on behalf of the defendant that the order for return was made for want of jurisdiction, and that, consequently, he was not in contempt; also, that the order for return was made, because returned, illegal and unauthorized.

In our opinion, the return was not unauthorized of the return and the subject matter of the proceeding at the time of the entry of the order of August 2, 1907, that the defendant was temporary return and return money for the return. Both the defendant and the defendant were in contempt, and, consequently, upon an affidavit of the defendant and on the return made in such cases, it was found that the return was jurisdiction of the return and the subject matter, and that the defendant was lawfully able to support his case and return.

There is no allegation, nor inference, that the defendant has at any time supported his wife or children, either under an order of the Municipal Court, or the Superior Court, and it is affirmatively stated in the affidavit in support of the petition for alimony that the defendant had not paid any sum whatsoever in pursuance of or in accordance with the order and direction of the court.

It is urged for the defendant that the court had no jurisdiction, on the ground that the Superior Court of Cook County was not in session from July 18, 1927, to September 17, 1927, and that, therefore, the orders of August 5 and August 9, 1927, were entered when the court was not in session, and that as a result they were void.

Paragraph 187, Section 1, Cahill's Illinois Revised Statutes, provides, "That the terms of the Superior Court of Cook County shall commence on the first Monday of every month." It follows, therefore, that this contention is untenable.

In our opinion, the contempt-order entered upon the failure of the defendant to pay moneys due for the support and maintenance of his wife and minor children, is valid in every respect.

For the reasons stated the order will be affirmed.

AFFIRMED.

HOLCOM, P.J. AND WILSON, J. CONCUR.

There is no suggestion, however, that the defendant was at any time involved in the activities of the defendant, or the defendant, and it is accordingly stated in the affidavit in support of the petition for habeas corpus that the defendant had no knowledge of the activities of the defendant, and it is accordingly stated in the affidavit in support of the petition for habeas corpus that the defendant had no knowledge of the activities of the defendant, and it is accordingly stated in the affidavit in support of the petition for habeas corpus that the defendant had no knowledge of the activities of the defendant.

It is urged for the defendant that the State has no evidence, on the ground that the defendant was not in the State at the time of the murder, and that the defendant was not in the State at the time of the murder.

every month. It follows, therefore, that this corporation is
not a bank within the meaning of the laws of the State of
New York, and that the same are not applicable to it.

and maintenance of his life and minor children, he will in the future of his children he may manage and his life and

Quantity of fish taken per 100 ft. of beach per day

RESULTS

© 2004 Blackwell Publishing Ltd, *Journal of Internal Medicine* 255: 105–112

NORTHWEST READY ROOFING CO.,
a Corporation,

Appellant,

v.

EDWIN H. STEPEK,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Nov. 7, 1928.

MR. JUSTICE TAYLOR delivered the opinion of
the court.

On December 9, 1927, the Northwest Ready Roofing Co., a corporation, as plaintiff, filed a statement of claim in the Municipal Court against Edwin H. Stepek, as defendant, in which it was alleged that on July 7, 1926, the defendant entered into a written contract with the plaintiff, by which contract the plaintiff bound itself to put a roof on the house and on the front and rear porches of the house located at 5331 Bishop Street, Chicago, for the sum of \$128.00, payable by the defendant in installments of \$11.00 a month, beginning August 15, 1926; that the contract provided that the plaintiff guaranteed the roof for a period of five years. It was further alleged in the statement of claim that the plaintiff furnished all the material and labor, and carried out all the terms of the contract agreed to be performed by July 7, 1926; that as a result, the defendant became indebted to it in the sum of \$128.00; that the defendant paid a total sum of \$44.00 on account of that sum, leaving a balance of \$84.00, which he has failed and refused to pay.

850 L.A. 038

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| RECEIVED ALLY HAVING CO.,
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INCORPORATED,
V.
EUGENE S. WHITE,
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Opinion filed Nov. 7, 1932.

THE COURT THEREUPON ADVISED THE OPINION BY

THE COURT.

ON NOVEMBER 5, 1932, THE FOREGOING BEING
DO, a corporation, as plaintiff, filed a statement of claim
in the United States District Court at Los Angeles, California,
in which it was alleged that on July 7, 1932, the defendant
entered into a written contract with the plaintiff, by which
contract the plaintiff agreed to pay a sum of ten thousand
dollars to the defendant and their heirs and assigns as
and on the terms and conditions of the contract. The
said contract was made, signed, and the sum of \$10,000, payable
by the defendant in installments of \$1,000 a month, beginning
on July 1, 1932, was the contract between the plaintiff
and the defendant. The sum of ten thousand dollars was paid
by the defendant to the plaintiff on July 1, 1932. It was further
alleged in the statement of claim that the plaintiff furnished
all the material and labor, and received out all the items of
the contract agreed to be performed by July 1, 1932; that as
a result, the defendant became indebted to it in the sum of
\$10,000; that the defendant paid a total sum of \$4,000 on
account of that sum, leaving a balance of \$6,000, which
has not been paid and is due to the plaintiff.

The statement of claim was verified by an affidavit.

On October 25, 1927, the defendant filed an affidavit of merits, in which it was alleged that the material furnished by the plaintiff was of an inferior grade and the workmanship was performed in a defective manner, which resulted in a leaky roof.

There was a trial before the court, with a jury, and a verdict finding the issues against the plaintiff. On November 9, 1927, judgment was entered on the verdict that the plaintiff take nothing by his suit, and that the defendant have and recover from the plaintiff his costs, and that execution issue therefor. This appeal is from that judgment.

It is urged for the defendant on this appeal that the verdict and judgment were contrary to the manifest weight of the evidence, and that certain evidence admitted on behalf of the defendant was incompetent and immaterial.

At the trial, the only witnesses who testified were Glenn. C. Lance, credit manager and roof investigator for the plaintiff, and Katherine Stepek, wife of the defendant, on his behalf.

There was offered in evidence the written contract for the work, which was dated July 3, 1926, and signed by the defendant.

The testimony of Lance is to the effect that the work in question was done in a workmanlike manner, and that the plaintiff never received any complaint of any kind in regard

The statement of claim was verified by me

attest.

On October 20, 1937, the defendant filed an affidavit of denial, in which it was alleged that the complaint was not an original copy and the defendant was not in a position to produce the original copy, which was destroyed in a fire.

There was a trial before the court, with a jury, and a verdict was returned against the defendant. On November 4, 1937, judgment was entered against the defendant for the amount of \$100,000, with interest thereon from the date of the trial to the date of payment.

It is noted for the defendant on this appeal that the verdict and judgment were entered in the absence of the defendant, and that certain evidence was admitted in violation of the defendant's constitutional rights.

At the trial, the only witnesses who testified were Edward J. Jones, Charles Jones and Mary Jones. The defendant, and his counsel, were not present.

There was offered in evidence the original copy of the complaint, which was dated July 1, 1937, and signed by the defendant.

The testimony of Jones is to the effect that the complaint was not an original copy, but that the defendant never received any complaint of any kind in regard to the defendant.

to the roof; that on the morning of November 28, 1927, he called at the house in response to a request by Mrs. Stepek; that on the day in question it was raining very hard; that she said that the roof leaked around the chimney; that he did not see that it was leaking around the chimney; that she said it had not leaked there that day, but it did leak; that he asked permission to go into the attic; that the house was a one-story and basement house; that he went up into the attic and looked everywhere - around the chimney and in the front of the house, - but did not find any sign of moisture; that he went down and then asked her if she could show him wherever it had leaked; that she said, " I can't show you, but it leaks when it rains;" that the Company had received \$44.00 on account of the contract and there still remained due \$84.00; that the last time the plaintiff got any money from the defendant was in January, 1927; that he, personally, did not go out there between January 7 and November 28, 1927.

The testimony of Katherine Stepek, for the defendant, is to the following effect: - That a new roof was put on the house in July, 1926; that a salesman used to call, and she made some payments on account, and one day she got a call by telephone asking for payment, and that she answered that the roof would have to be fixed before she made any further payment; that that was in February, 1927; that she called up the plaintiff about three times concerning the roof; that she had never heard from the plaintiff since she said over the telephone that she refused to pay unless the roof was fixed; that on November 28, 1927, she showed Lance where the roof leaked, and that Lance said, "that is the idea of papering over a wet ceiling?" that she answered, "You will have to see my

husband, him and the decorator done it;" that she showed Lance where the leaks were; that he said, "There is none there now;" that she said, "There is new paper and new plaster put up there;" that that was in the dining-room; that she had the wall and ceiling patched up around the chimney and in the front by the front windows where it was leaking, so it would not go in the plaster again. She was then asked how much it cost to fix the roof, plaster the front room, plaster around the chimney and put new paper on, and, over the objection of counsel for the plaintiff, she answered that she was charged \$12.00 to fix the plaster, \$12.00 for the roof, and \$38.00 for the decorating, making in all \$62.00.

From the foregoing, it will be seen that in reality it was a question of credibility for the jury.

It is true that the evidence as it appears in the abstract is somewhat confusing, but an examination of the actual testimony as it was recorded in the record, discloses sufficient, in our opinion, to justify the verdict of the jury, and, under the circumstances, we do not feel that we should override their verdict. A careful reading of the testimony of the wife of the defendant, if it is believed, leads to the conclusion that the roof was not put on in a good and workmanlike manner, and that the guaranty in the written contract was not carried out.

It is also urged for the defendant that the trial judge erred in permitting the introduction of the testimony of the wife of the defendant as to what was charged and paid for fixing the plaster and roof, and for decorating. Inasmuch as it was, in and of itself corroborative evidence of her testimony that the roof had leaked, it was competent.

For the reasons stated, the judgment will be affirmed.
AFFIRMED.

NOLSON, F.J. AND WILSON, J. CONCUR.

11-10-1911

From the University of Illinois at Chicago, Chicago, Illinois

...and all children to receive a new set of values

[illegible]

It is also noted for the defendant that the trial judge stated in granting the instruction of the testimony of the wife of the defendant as to what was stated and said for living, the husband and wife, and for themselves, because as it was, in fact it itself was a statement of her testimony that she had been, it was necessary.

For the purpose of this study, the following

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6972a
250 I.A. 639
101 - 32698

WILLIAM B. CASTENHOLZ, et al,

Appellees,

v.

ARTHUR MICHEL,

Appellant.

Appeal from

Municipal Court,

of Chicago.

Opinion filed Nov. 7, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

The statement of claim in this cause charges that the plaintiffs, William B. Castenholz, Fred S. Johnson, Milton B. Block and Frank J. Rothing, copartners, doing business as Castenholz, Johnson, Block & Rothing, were employed by the defendant, Arthur Michel, doing business as Arthur Michel & Co., to audit certain books of the defendant and that, as a result of said employment, the plaintiffs performed certain services for the defendant and charged for the same at a certain per diem rate.

A trial was had before the court without a jury and resulted in a finding in favor of the plaintiffs and against the defendant and judgment in the sum of \$1,714.56 and costs. From this judgment an appeal was prayed and allowed to this court.

Rule 19 of this court provides that the brief of the party bringing the cause of action into this court, shall contain a short, clear statement of the case, showing: first, the form of the action, how the issues were decided in the trial

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court and whether by verdict or finding of the court; second, the nature of the pleadings sufficiently to show the issues; third, the leading facts without discussion or argument; and fourth, a terse outline of the points relied upon for reversal followed by a brief of the points and the authorities to support them.

The brief filed in this cause on behalf of the defendant below, fails to comply with this rule, in that the particular points are not specifically pointed out and there is no terse statement of the facts showing upon which points defendant relies to reverse the judgment, nor are there any points and authorities as provided by the rule.

From the argument of the cause, however, it may be gathered that the particular objection urged is that the trial court permitted certain witnesses to testify from time sheets, over the objection of counsel and that this was error. It appears from the testimony that the plaintiffs employed certain accountants who spent several days on said work and, when placed upon the stand, testified as to the time spent by them from the time sheets. The objection urged is that the witnesses should first have identified the time sheets and testified that they were correct and that, thereupon, if the witness had no independent recollection of the fact in question, he could refresh his recollection from the time sheet and then testify if he had an independent recollection of the facts after so refreshing his recollection. Or, in the event the witness was unable to remember after consulting the time sheet that, thereupon, the time sheets could be introduced in evidence when it appeared that they were made at the time and were correct memoranda of

the facts. This is a correct rule of law and we have no quarrel with it, but the cause at issue is governed by a further rule which obviated the necessity of this particular testimony. The bookkeeper of the plaintiff company, Anna Herold, was placed upon the stand and testified that, in the usual course of business, she posted said time sheets on a "job summary" and that this "job summary" contained a correct computation of the amount due for such services, according to a per diem rate and that she checked the "job summary" against the time sheets. The employees who furnished the time sheets, from which the "job summary" was made, testified that they were correct.

This testimony was sufficient to make the record of the plaintiff, kept in the usual course of business, admissible in evidence. Moore v. David J. Molloy Company, 232 Ill. App. 395; The People v. Small, 319 Ill. 437; Chisholm v. Beaman Machine Co., 160 Ill. 101; Houss v. Beak, 141 Ill. 290.

The job summary was admitted in evidence. It does not appear in the abstract, however, and we assume that it was properly in evidence and properly proven. The cause was tried before a court without a jury and we necessarily conclude that its finding was based upon proper evidence.

If the records of the company, kept in the ordinary course of business, were properly proven and before the court for its consideration, the fact that the court admitted improper testimony on behalf of the plaintiff, would not be

a ground for reversal in view of the rule that the court is only presumed to consider evidence which is material.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HOLDOM, P.J. AND TAYLOR, J. CONCUR.

From all that has been said it will be seen that the
defence of the accused is not in any way affected.

The accused is not in any way affected by the
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defence of the accused.

6973a
21 - 32744

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

ALMA JACKSON,

Plaintiff in Error.

250 I.A. 640¹

WRIT OF ERROR TO

MUNICIPAL COURT

OF CHICAGO.

Opinion filed November 7, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

The information filed in this cause charged the defendant Alma Jackson with willfully and knowingly keeping a certain house of ill fame in the City of Chicago, County of Cook and State of Illinois.

When the cause was called for trial a motion was made by the defendant to suppress evidence on the ground that certain police officers of the City of Chicago entered the premises without a search warrant and obtained the evidence upon which this prosecution is based.

It is insisted on behalf of the defendant Alma Jackson, by her counsel, that the action of the officers was unwarranted in law and a violation of her constitutional rights in that her right to be secure against unreasonable searches and seizures was violated because of the want of a search warrant.

From an examination of the record it appears that one of the police officers, saw the defendant soliciting persons

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REPORT BY THE STATE OF ILLINOIS,
DEPARTMENT OF JUSTICE,

CHICAGO, ILLINOIS

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CHICAGO, ILLINOIS

CHICAGO, ILLINOIS

CHICAGO, ILLINOIS

Opinion filed November 7, 1933.

Mr. Justice delivered the opinion of the

court.

The defendant filed in this court during the
defendant's trial evidence which allegedly showed a
certain state of his mind at the time of the
crime and state of Illinois.

When the case was called for trial a motion was
made by the defendant to suppress evidence in the ground that
certain police officers of the City of Chicago entered the
premises without a search warrant and obtained the evidence
upon which this prosecution is based.

It is insisted on behalf of the defendant that evidence
is not competent, that the action of the officers was unauthorized
in law and a violation of her constitutional rights in that they
right to be secure against unreasonable searches and seizures
was violated because of the want of a search warrant.

From an examination of the record it appears that
one of the police officers, one of the witnesses calling persons

upon the street in the vicinity of the house in question, No. 3733 Indiana avenue, Chicago, Illinois, and saw her enter the residence with a man, that there was no breaking down of doors by the officer, but that the door was open and he walked in and had a talk with the defendant and one Endicott, the man who had entered the house with the defendant; that in his presence the said Endicott stated that he had had intercourse with the defendant on the premises.

The testimony further shows that another police officer of the City of Chicago, Joseph Pieroth, noticed a girl on the premises rapping on the glass in the door as men walked by and that he then walked to the rear and was let in by a colored man and that they thereupon arrested the defendant.

There appears to have been no breaking into the premises, nor was the entry for the purpose of procuring evidence, but for the purpose of making an arrest. We do not believe that the action of the officers in this regard was a violation of any constitutional right of the defendant. The motion to suppress the evidence having been overruled the cause was submitted to a jury which found the issues against the defendant, finding her guilty as charged in the information, and judgment and sentence were entered upon said verdict.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HOLDEN, P.J. CONCURS

TAYLOR, J., not participating.

upon the record in the vicinity of the house in question, he
STILL INSISTS, however, that, in 1912, and even two years
the residence with a view that there was no possibility that at
down by the others, but that the house was then and is being
in and had a talk with the defendant and his family, and
now you had entered the house with the defendant, and in the
presence the wife insisted upon that he had had intercourse
with the defendant on the occasion.

The defendant further insists that during the
absence of the City of Chicago, Joseph Smith, received a gift
on the residence residing on the floor in the first as was called
by him that he then called to the wife and was not by a
defendant and that the defendant returned the defendant.

There appears to have been no discussion with the
defendant, and not the only for the purpose of securing evidence,
but for the purpose of making an arrest. It is now believed
that the action of the witness in this regard was a violation
of any constitutional right of the defendant. The reason for
supposing the witness having been arrested the wife has not
alleged in a way which the witness against her testimony,
further but rather as charged in the testimony, and defendant
and witness were arrested upon this charge.

For the reasons stated in this report the defendant
of the National Guard is released.

Respectfully,
J. A. Smith

Witness, J. A. Smith
J. A. Smith, J. A. Smith

32759

6974a

CHRIST WHEELER,

Defendant in Error,

v.

DAVID JAMIESON and MALCOLM
JAMIESON, doing business as
JAMIESON BROS.,

Plaintiffs in Error.)

250 I.A. 640²

ERROR TO

SUPREME COURT,

COCK COUNTY.

Opinion filed Nov. 7, 1928.

MR. JUSTICE WILSON delivered the opinion of the
court.

This was an action in assumpsit on a promissory note made by the Commercial Coal & Coke Company to the order of David Jamieson, one of the defendants, which was endorsed in blank by him and also by the defendants by the name and style of Jamieson Bros., and delivered to the plaintiff for a valuable consideration. The note was for \$4,187.34, and was dated March 1, 1924, at Chicago, Illinois, payable six months after date. The giving of the note and the obligation thereon is admitted. The entire business of Jamieson Bros. was sold on August 28, 1925, and an affidavit listing the creditors of Jamieson Bros. was made September 10, 1925. The total obligations listed in the affidavit required under the Bulk Sales Law amounted to \$2,955.53, but did not include the claim of the plaintiff which it was stated amounted to over \$4,000, or considerably more than the entire amount of the listed claims. Under the Bulk Sales Law the failure to list this claim was a fraud on the plaintiff, and in view of the fact that it was evident that it was the largest single claim

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Opinion filed Nov. 7, 1875.

THE COURT OF COMMONS, IN THE MATTER OF

1875

THIS CASE ON PETITION FOR WRIT OF HABEAS CORPUS

IN FAVOR OF THE PETITIONER, AND IN OPPOSITION TO THE

OBJECTIONS OF THE RESPONDENT, AND IN ANSWER TO THE

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and more than the entire other indebtedness, it would appear as a matter of fact that it was intended that the plaintiff should not have notice of the transfer of the assets of the company, and would raise a presumption of fraud, independent of the statute. An attachment in aid was obtained against a certain piece of real estate which was in the name of Malcolm Jamieson, one of the defendants, and this property, according to an affidavit filed herein on behalf of the defendants, appears to have been conveyed to the daughter of the defendant, one Helen Sammons and her husband. This purported assignment apparently was made on June 27, 1925, or about two months prior to the transfer of the property of the defendant Jamieson and Jamieson Bros. The transfer of this real estate, prior to the sale of all the business of the defendants, would in itself cause doubt and suspicion as to the good faith of the transfer to the daughter of the defendant. The cause was heard before the court without a jury; evidence was heard, and the court being fully advised in the premises, found the issues for the plaintiff and assessed his damages in the sum of \$5,013.88. What purports to be a bill of exceptions was filed herein but there is no certificate of the trial court attached to said bill, stating that it contains all the testimony heard at the trial. Under such a condition of the record we have to assume that there may have been other evidence upon which the court based its opinion. Culver v. Schroth, 183 Ill. 437; Mallers v. Whittier Machine Co., 170 Ill. 434. Moreover, it appears from the so-called bill of exceptions that there was no testimony whatever as to the fact of the conveyance by Malcolm Jamieson to his daughter of the property in question

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nor was there any testimony as to any payments made by her in consideration of the said transfer, but the defendant relied upon his motion to dismiss the writ of attachment on said property, and an affidavit filed in support thereof; and it is argued on behalf of the defendant herein that the burden was upon the plaintiff to show that there was actual fraud in the transfer of said property by the defendant to his daughter. As has already been stated the so-called bill of exceptions contains no testimony in regard to the transfer. It has been argued in the briefs filed by the defendant that said transfer was not fraudulent, but there is no evidence in support of that position and the entire argument appears to be based upon the failure of the trial court to sustain a motion to direct a verdict for the defendant on the ground stated, and it has been argued here as if said facts were in evidence. In view of the fact, as already stated, that the bill of exceptions does not contain a certificate of the trial court that it contains all the testimony, this court is forced to take the position that the judgment of the trial court was based upon proper testimony, and therefore the judgment in favor of the plaintiff was properly entered. The daughter, Helen Sammons and her husband claimed by the defendant to be the real owners of the property, do not appear to have participated in the proceedings. If the property had been conveyed as charged by the defendant Malcolm Jamieson, then the real parties in interest were Helen Sammons and her husband. The conveyance of the property of the defendant being a complete conveyance of all its property, without listing the plaintiff as a

- 4 -

creditor, was a fraud on the plaintiff and it was entitled to its judgment in the trial court.

For the reasons stated, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HOLDOM, F.J. AND TAYLOR, J. CONCUR.

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the largest in the city.

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...is ...

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43 - 32775

ELMER JORDAN and WALTER DETTMANN,
Co-partners, Doing Business as
Jordan & Dettmann,

Appellants,

v.

W. C. WARNER,

Appellee.

250 I.A. 640³
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Nov. 7, 1928.

MR. JUSTICE WILSON delivered the opinion of the court.

The claim in this case is for real estate brokers' commission growing out of the purchase and sale of a certain two flat building located at 7750 South Hermitage avenue, Chicago, Illinois.

The cause was tried by court and jury in the Municipal Court of Chicago, resulting in a verdict finding the issues against the plaintiffs and in favor of the defendant, and judgment on the verdict. Motion for a new trial was overruled and this appeal perfected to this court.

The facts show that on or about April 17, 1926, the plaintiffs, Walter C. Dettmann and Elmer Jordan, doing business as Jordan & Dettmann, were duly licensed real estate brokers in the City of Chicago; that on or about that date, the defendant, W. C. Warner and his wife, appeared in the offices of the plaintiffs and listed their property for sale, but did not give plaintiffs an exclusive right. The price fixed by the defendant, at the time, was \$18,800 net to him for the property, of which \$4500 was to be cash.

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CS - 10775

ELDER JAMES AND JESSE BENTLEY,
DEFEATED, AGAIN BENTLEY AS
LOUISIANA BENTLEY,

UNRECORDED COPY

RECORDED

BY ORDER OF THE COURT
IN CHANCERY

J. H. BENTLEY

LOUISIANA

Opinion filed Nov. 7, 1938.

MR. JUSTICE CLARK delivered the opinion of the

COURT.

The claim in this case is for the estate of
JAMES BENTLEY, deceased, and is based on a certain
will of JAMES BENTLEY, deceased, of which the
testator, JAMES BENTLEY, died in 1938.

The issue was tried by jury and jury in the
Supreme Court of Louisiana, resulting in a verdict finding
the issue against the plaintiff and in favor of the defendant,
and judgment on the verdict. Motion for a new trial was
overruled and this appeal followed to this court.

The facts show that on or about April 17, 1938, the
plaintiff, JAMES BENTLEY, and JESSE BENTLEY, being business
partners, were jointly licensed real estate brokers
in the city of Chicago; that on or about that date, the
defendant, J. H. BENTLEY and his wife, resided in the village
of the plaintiff and lived there jointly for some time
and gave plaintiff an exclusive right. The price fixed by
the defendant, at the time, was \$10,000 and to him for the
property, at which \$10,000 was to be paid.

The defendant never again appeared in their offices, nor does it appear from the testimony that he was notified at any time that plaintiffs had procured a purchaser. The property was sold by the defendant to the purchasers who were a Mr. A. L. White and a Mrs. Margaret Gerth, his mother-in-law, on or about July 12, 1936.

Bettmann testified on behalf of his firm that he met Warner and his wife on or about April 17, 1936, when they came to his office, and that he never saw Warner again after that date, but that the property was shown to A. L. White by one of his salesmen and that he also saw White in his office two or three weeks after Warner had been there; that he himself took three or four prospects to the building and advertised the property in the Chicago Daily News, a newspaper published in the City of Chicago. He testified further that at the time he talked with White, it was stated that White could only put \$2500 into the building and that, thereupon, a contract was drawn and signed by White and a note given for \$1,000, as earnest money. He did not inform Warner that he had a purchaser willing to give \$2500, and subsequently and before the actual sale of the property gave the note back to White.

Mrs. Margaret Gerth testifying on behalf of the defendant stated that she had known that this property was for sale in January, 1936, through a certain Mrs. O'Rourke, but that she never saw either Bettmann or Jordan concerning the property or any of their employees.

It is earnestly insisted on behalf of plaintiffs that the verdict of the jury was manifestly and clearly against the weight of the evidence. It is insisted on the other hand by

The defendant never again appeared in court after that time. It appears from the testimony that he was notified at any time that defendant had received a subpoena. The property was sold by the defendant to the persons who were Mr. A. J. White and a Mrs. Margaret Smith, his mother-in-law, on or about July 12, 1936.

Defendant testified on behalf of his firm that he had written and his wife on or about April 17, 1936, when they came to his office, and that he never saw anyone come there after that date, but that the property was shown to A. J. White by one of his salesman and that he also saw White at the office two or three months after he had been given that he should look after it. The property was the building and everything in the city of Chicago. He testified further that as he was being called with White, it was stated that White would only see White into the building and that, therefore, a witness was shown and signed by White and a note given for \$1,000, as witness money. He did not believe anyone that he had a check drawn on for \$1,000, and subsequently and before the actual sale of the property gave the note back to White.

Mr. Margaret Smith testifies on behalf of the defendant stating that she had known that this property was sold to her in January, 1936, through a certain Mrs. Elizabeth. That she knew and other persons who were connected with the property at that time.

It is somewhat interesting on behalf of Elizabeth that the parties of the firm are mentioned and clearly stated the rights of the witness. It is testified on the other hand by

defendant that the plaintiffs were not the procuring cause of the sale and that at no time did the plaintiffs procure a purchaser ready, able and willing to pay the requisite cash and, furthermore, that the advertisement in the Daily News was inserted after the sale and that there was an abandonment on the part of the broker and, therefore, plaintiffs were not entitled to recover.

The jury was properly instructed to the effect that if they found the plaintiffs had submitted the property to White and that the defendant and White were put into communication concerning the property by the plaintiffs and that it was subsequently sold without a revocation by defendant of plaintiffs' authority, then the plaintiffs would be entitled to recover.

The law is well settled that a real estate broker who has begun negotiations, for a sale for his principal, which are subsequently carried on to a final consummation by his principal, cannot be deprived of his right to commission because the negotiations were completed without his aid. But, this is a question of fact for the jury.

There is no objection made to the instructions and the only question involved appears to be as to the weight of the testimony. The cause was tried before a jury which found the issues in favor of the defendant. Judgment was entered upon said verdict by the trial judge. Both the jury and the trial judge were in a position to see and observe the manner and demeanor of the witnesses with a better opportunity to weigh the testimony than would a court of review. We are unable to

[illegible]

The first two chapters introduced to the study of the history of the United States and the history of the United States.

The law is well settled that a trial before a jury is the right of the accused, and that the right is not waived by the failure to object to the admission of evidence at the trial.

[illegible]

say that the verdict and judgment of the trial court is so clearly and manifestly against the weight of the evidence as to require a new trial.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HOLCOM, P.J. AND MYNER, J. CONCUR.

and that the receipt and judgment of the first court is no
directly and manifestly against the weight of the evidence
as to receive a new trial.

For the reasons stated in this opinion, the judgment
of the second court is affirmed.

REVEREND JUSTICE

WILLIAM J. VAN DUSEN, J. C. J.

32696

RAI CLARITZ,
Appellee,

vs.

FORT DEARBORN AUTOMOBILE
INSURANCE COMPANY, a
Corporation,
Appellant.

250 I.A. 640⁷

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover the value of his automobile which was stolen and which was covered by a policy of insurance issued by the defendant. The case was tried before the court without a jury. The court found in favor of the plaintiff and assessed his damages at \$800. Judgment was entered on the finding and the defendant appeals.

The record discloses that on May 21, 1926, the defendant issued to plaintiff its insurance policy, insuring against loss by theft, robbery or pilferage of the automobile. The face of the policy was for \$1,000 and covered the period from May 21, 1926, to May 21, 1927. The automobile was stolen on February 16, 1927. The defendant in its affidavit of merits called for strict proof as to the theft of the car, denied that plaintiff had given defendant the notice required by the policy, denied that the automobile was of the value of \$1,000, and set up by way of defense that plaintiff had violated the provisions of the policy in that he left the automobile unlocked.

The facts are substantially as follows and are not disputed. During most of the period covered by the policy the automobile in question was kept in a public garage. At the time the car was stolen plaintiff was in Florida and his daughter-in-law was authorized to use the car. She had been using it during

practically the entire period covered by the policy. On the day the car was stolen the garage keeper received a telephone call for him to deliver the car at the corner of Kedzie avenue and Madison street, Chicago. He testified to this effect, and further that the telephone call was from plaintiff's son; that upon receiving this request he drove the car to the above location; that it was raining at the time and he waited for a few minutes but no one came for the car; that he thereupon locked the transmission, put the keys in his pocket and left the car at that place. The evidence further shows that this was the last time the car had been seen. It further appears from the evidence that the garage man was not authorized to leave the car as he testified he had done. When it was learned the car had been stolen, plaintiff notified the Insurance company and made proof of the loss. He also notified the police department.

A witness testified for the plaintiff that he was an automobile dealer and had been engaged in selling Buick automobiles for fourteen years; that he sold the Buick car in question to plaintiff in May, 1928, for \$1600; that there were two sets of keys delivered to plaintiff at the time of the sale; that he last saw the car about December, 1926, when it was in good condition; that it was a new car when it was sold to plaintiff; that in his opinion the fair cash market value of the automobile was eight or nine hundred dollars. Other witnesses testified that at the time the car was stolen it was in good condition.

The policy provided that "The automobile described is usually kept in private garage." The defendant contends that the information as disclosed by the evidence given by the plaintiff to an insurance broker that plaintiff had changed his automobile from a private garage to a public garage, was not notice to the defendant of this fact because the broker was in no way

connected with the defendant. Without passing upon this question we think it is entirely immaterial and beside the point. The automobile was not stolen from a private or public garage but from a public street where it was left by the man who ran the garage. The argument of the defendant to the effect that there is no liability under the policy because plaintiff violated the provisions of it when he kept the automobile in a public garage when it was stated in the policy that it would be kept in a private garage, is also immaterial. As stated, the car was stolen when left in a public street, Kedzie avenue and Madison street. Moreover the testimony in the case is that the car was locked when left at that point; so it appears that if there was a violation of the provisions in keeping the car in a public garage, which we think there was not, this would be entirely immaterial in view of the facts stated. And the argument that plaintiff kept the automobile unlocked in a public garage is likewise immaterial, because the testimony is that the car was locked when it was left in the street.

The defendant contends that the judgment is wrong because there was no evidence of the value of the car at the time it was stolen. This contention is contrary of the evidence. As already stated, a witness gave competent testimony as to the value of the car and there was none to the contrary. The argument advanced by the defendant as to why the judgment should be reversed is without merit, and the judgment is affirmed.

AFFIRMED.

McSurely and Hatchett, JJ., concur.

32763

CHARLES BRADLER,
Appellant,

vs.

MORRIS BERIG et al.
LOUIS KAPLAN,
Appellee.

6977
250 I.A. 40
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

On April 7, 1927, plaintiff brought suit against Morris Berig, Harry Berig, Isaac Cohen, Joe Berig, Louis Kaplan and Doctor Ben Nadler, doing business formerly as Chicago Distilling Company, to recover \$690 together with interest thereon and attorney's fees.

Plaintiff's claim was alleged to be for wages due him as a night and day watchman. The summons was served on Dr. Ben Nadler on May 6, 1927, and returned not found as to the others. Nadler entered his appearance on May 9, 1927. An order was entered on that date giving him ten days within which to file his affidavit of merits. He filed his affidavit of merits, denying that he was indebted to the plaintiff. On July 18, 1927, an alias summons was served on the defendant Louis Kaplan; July 28th his appearance was entered by his counsel and on the next day an order was entered giving him ten days within which to file his affidavit of merits. He filed his affidavit of merits on August 6, 1927, denying that he owed plaintiff any money and denying the allegations of the statement of claim in toto and in detail. The next that appears from the record (which is certified by the clerk of the Municipal court to be a complete transcript) is an order entered January 19, 1928. By this order the suit was dismissed as to the defendant Nadler. The cause came on for hearing in the

550 T. 12640

OFFICE OF THE DISTRICT ATTORNEY
ST. LOUIS, MO.
JANUARY 10, 1917.

THE DISTRICT ATTORNEY,
ST. LOUIS, MO.

REPLY TO THE DISTRICT ATTORNEY
JANUARY 10, 1917.

Dear Sir:

I have the honor to acknowledge the receipt of your letter of January 9, 1917, in relation to the above captioned matter. In reply to inform you that the same has been forwarded to the proper authorities for their consideration. I am, Sir, very respectfully,
Yours truly,
J. H. [Name]

absence of the defendant Kaplan, the court heard the evidence, found the issues for the plaintiff and against Kaplan and assessed damages in the sum of \$680, together with costs and attorney's fees. More than thirty days thereafter, March 2, 1928, defendant Kaplan filed an affidavit made by his counsel and moved the court that the judgment entered against him be vacated. The motion was allowed, the judgment vacated, and plaintiff appeals.

The affidavit filed by defendant's counsel sets up that he attended in the Municipal court when the case was called for trial on October 24, 1927, at which time defendant Kaplan was ready for trial; at that time plaintiff's counsel appeared and "stated and represented unto affiant that it would be necessary for plaintiff to sue out various writs of alias summons to summon four other defendants who had been made parties defendant, and that affiant need not attend upon the continuance of said cause until such service was had by said plaintiff's attorneys, and further said person stated to affiant that when service was procured said person would notify affiant when the case was set down for hearing, at which time affiant and his witnesses would come in and defend said cause;" that affiant relied upon such statement and had no knowledge or notice of the entry of the judgment against his client until affiant's client was served with an execution on February 26, 1928. The affidavit further set up that the docket of the case which was inspected by the affiant on March 1, 1928, shows that on October 24, 1927, the case was continued by the court to November 8, 1927, and on the latter date another order was entered continuing it until January 19, 1928, and that these orders were entered without the "knowledge of affiant and while affiant was waiting to be informed of service of process upon the other defendants," and that he had received no such notice; that Kaplan had never employed plaintiff in the capacity of a watchman or any other

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statement of the defendant's family, the court found the evidence
favorable to the plaintiff and against the defendant and awarded
damages in the sum of \$1000. Judgment with costs and attorney's

fees. With this writ of habeas corpus, dated 11/11/1917, returned
against the defendant, made by the court and served the next
day, the defendant refused to appear. The action was
dismissed, the judgment vacated, and plaintiff awarded.

The defendant's trial by jury was held with an

jury as returned in the original writ when the writ was issued
for trial on January 11, 1917, at which time the defendant's motion was
granted for trial by jury. At that time plaintiff's motion was denied.

"Detailed and comprehensive" were the facts in this case, and
for plaintiff to win the case required all the facts to be proven
from other witnesses who had been called by the defendant, and

that the jury had not found upon the evidence in this case
until such evidence was called by the plaintiff's witnesses, and
therefore the court should have allowed the defendant to prove

its case and then the plaintiff's case. The court said that
for plaintiff, at which time the plaintiff's motion was made to
and refused with costs. The plaintiff's motion was denied.

and had no knowledge or belief of the facts of the defendant's motion
and the court should have allowed the defendant to prove its case
and then the plaintiff's case. The court said that

February 11, 1917. The defendant's motion was granted for trial
of the case and was supported by the plaintiff on March 1, 1917,
which was the date of the trial, and the court was divided by the jury

in December, 1917, and the court said that the case was
found against the plaintiff on March 11, 1917, and that the case
was returned against the defendant on March 11, 1917, and the court

ordered to be returned of service of process upon the defendant's
motion, and that he had received no notice of the trial and
never appeared personally in the capacity of a witness or as agent

capacity, and never became liable to plaintiff on any account.

This affidavit was all that was before the court and is the basis for the order vacating the judgment. We think this affidavit was entirely insufficient, being too indefinite and uncertain. It is obvious that litigation could not be conducted if judgments could be set aside long after the lapse of thirty days, on oral statements such as the affidavit avers were made when the case was reached for trial. It is clear that counsel for the defendant was negligent. The affidavit does not show any diligence in examining the record in the case. Moreover, it does not negative the fact that counsel's client, the defendant, had notice of what had been done in the case.

The instant proceeding was brought under Sec. 82 of the Municipal Court Act and is similar to that provided for under Sec. 50 of the Practice Act; and since the allegations of the affidavit were not traversed we must assume them to be true; but, as stated, we think they are entirely insufficient to warrant the court in vacating the judgment, because it is clear that the defendant was guilty of negligence.

The order of the Municipal court appealed from is reversed and the matter remanded for further proceedings in accordance with the views expressed in this opinion.

REVERSED AND REMANDED.

McSurely and Hatcher, JJ., concur.

possibly, and never before again in history as we know it.

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32776

PRICE REALTY SECURITIES
CO.,

Appellant,

vs.

ARTHUR KAPERNICH,
Appellee.

6978a
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

250 I.A. 641

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover \$225 which it claimed was due for commissions in negotiating a loan for \$4500. The case was tried before the court without a jury, there was a finding and judgment in favor of defendant, and plaintiff appeals.

Plaintiff alleged in its statement of claim that it was a duly licensed real estate broker with offices in Chicago; that defendant owned a piece of real estate on which he desired to place a mortgage to secure a loan to enable him to construct a building on the property; that he employed plaintiff to obtain the loan for him and agreed to pay a commission of 5 per cent. It further set up that plaintiff had obtained the loan and that there was \$225 commission due.

Defendant filed an affidavit of merits in which he denied that plaintiff was a duly licensed real estate broker, and averred that he had requested plaintiff to procure a loan of \$5,000 for him, the loan to be secured by a mortgage on certain real estate on which the defendant desired to construct a building; that plaintiff had failed to secure the loan of \$5,000, but advised defendant that it had secured \$4500, which the defendant refused to accept. A further allegation was that the defendant had not agreed to pay a commission of 5 per cent and denied that there was anything

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Source: U.S. Census Bureau, *Marriage, Divorce, Remarriage in the 1990s*, p. 10.

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U.S. Patent 4,811,411

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On page 4, paragraph 1, line 2, "and" should be "and" and "and" should be "and".

due from him to plaintiff. In an amended affidavit of merits the defendant set up that he had advised a representative of the plaintiff that a certain bank had agreed to loan him \$4500 on the property for the purpose of constructing the building, but that defendant desired a loan of \$5,000; that thereupon the representative prepared an application and presented it to the defendant for his signature; that upon an examination of it the defendant saw it called for a loan of only \$4500 and advised plaintiff's representative that he required a loan of \$5,000; that plaintiff's representative fraudulently stated that it was plaintiff's practice to make the loan out at from \$500 to \$700 less than the amount that was desired; that thereupon, relying upon the statement made, defendant signed the application for the loan.

On the trial of the case plaintiff offered some evidence tending to show that it was a duly licensed real estate broker under the laws of the state and the city ordinance. Defendant in his brief contends that the proof failed to show that plaintiff was a licensed real estate broker, but that on the contrary the proof showed it was not such a licensed broker. Although plaintiff alleged in its statement of claim that it was a licensed real estate broker and although this was denied by the defendant in his affidavit of merits, yet this issue as joined was immaterial. The statute which requires a real estate broker to be licensed defines a real estate broker as follows: "A real estate broker within the meaning of this act is any person***** who for compensation or valuable consideration, sells or offers for sale***** or negotiates the purchase or sale or exchange of real estate ***** for others." (Sec. 2, chap. 17-A, Cahill's Statutes.) It is obvious that this section does not apply to the procuring of loans.

J. E. Crook testified for plaintiff that he was employed by plaintiff and handled the transaction with defendant;

that he called upon defendant and discussed the question of the loan; that defendant wanted to procure a loan of \$5,000, but witness stated that plaintiff would not loan more than \$4500 on the property; that thereupon he filled out a blank form of application for a loan of \$4500; that this application was signed by the defendant, who gave the witness information as to the location, description, etc., concerning the property. The application clearly specifies that defendant authorizes plaintiff to obtain a mortgage loan for him of \$4500 for five years with interest at 6 per cent. There was also written in the blank provision for partial payments before the end of the five years.

Defendant testified that he signed the application after having examined it and that he called attention to the fact that the application called for a loan of but \$4500, and that Crook thereupon stated that it was always plaintiff's practice to make out applications for from \$500 to \$700 less than the amount actually desired, and that thereupon he signed the application. Crook denied that he made any such statement.

The evidence further shows that afterwards defendant obtained a loan of \$4500 from his bank, for which he paid a commission of 3 per cent. The defendant further testified that he desired to obtain a loan so that he could put up a bungalow on some vacant property that he owned; that he had been engaged in the contracting business all his life and had made several building loans and in making them had signed applications and knew the custom and practices of persons from whom he had obtained the loans in such matters.

A careful consideration of all the evidence in the record leads us to the conclusion that the finding of the learned trial Judge on the merits is against the manifest weight of the evidence. We think the testimony of the defendant shows that the

that he called upon Belmont and discussed the question of the
 issue; that Belmont stated he received a letter of 12,000, and
 witness stated that Belmont would not have been able to
 the property; that Belmont was killed and a letter of 12,000
 action for a loan of 12,000; that the application was signed
 by the defendant, who gave the witness information as to the
 action, including the property, the witness
 then closely examined the defendant's statement and finally
 obtain a mortgage from the wife of Belmont for five years with
 interest at a per cent. There was also action in the State
 protection for Belmont's property and the wife of Belmont
 defendant received from Belmont the witness was examining
 after Belmont's death he was not called attention to the fact
 that the application called for a loan of 12,000, the wife
 Grook Belmont stated that it was simply Belmont's intention to
 wife and application for from 1200 to 1200 less than the money
 actually received, and that Belmont was almost the same
 Grook stated that he was not sure of the statement,
 The witness further stated that Belmont's statement
 was written a loan of 12,000 from the wife, for which he paid
 a mortgage of 12,000. The defendant further stated that
 he desired to obtain a loan of 12,000 for a mortgage
 on some property that he owned; that he had been engaged in
 the contracting business all his life and had some success in it.
 for Belmont and in doing this had almost bankrupted and lost the
 action and obtained it from Belmont's wife when he had received the
 loan in cash money.
 A second examination of all the evidence in the
 report leads to the conclusion that the action of the defendant
 first stage in the matter is against the witness's right of the
 evidence. We think the testimony of the defendant shows that the

transaction did not take place as defendant testified. He was a man familiar with such matters, having obtained several loans covering a period of several years, and it is obvious that he knew that the amount stated in the application for the loan was not less than the amount desired.

Since this case was tried without a jury, the judgment of the Municipal court will be reversed and judgment will be entered in this court in favor of the plaintiff and against the defendant for \$225.00.

JUDGMENT REVERSED AND JUDGMENT
ENTERED IN THIS COURT.

McSurely and Hatchett, JJ., concur.

32137

HARRY F. HENNEGAN and
WILLIAM F. HERZOG,
Appellees,

vs.

PAUL P. PIROLA,
Appellant.

6979
2501.4841

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McCURRY DELIVERED THE OPINION OF THE COURT.

Plaintiffs, commencing an action of the fourth class in the Municipal court, claiming an amount due from defendant for work, labor and material furnished, upon trial had judgment for \$290.08 upon a verdict of the jury pursuant to a mandatory instruction of the court. Defendant seeks a reversal. Plaintiffs do not appear in this court to defend the judgment.

The reversal is asked on the ground of misconduct of the trial Judge and the record amply justifies this.

We will narrate only a few incidents which call for a reversal. After considerable difficulty the case was finally called for trial on the regular jury calendar at twelve o'clock noon, March 29, 1927. At that time an attorney asked to read an affidavit of one of the counsel to the effect that he was actually engaged in the trial of another case but the court refused to permit this to be read or filed and ordered the trial to proceed.

At the conclusion of the testimony of one of the witnesses for plaintiffs the trial Judge asked plaintiffs' counsel how many more witnesses he had, to which counsel answered that he had two more who would "corroborate" the testimony of the first witness. Counsel for the defendant objected to this remark, but instead of sustaining the objection the trial Judge addressing counsel for plaintiffs said:

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"Mr. Greenstein, do you want to call each of these witnesses and ask each of them his business and then ask each of them if he heard the testimony of plaintiff and if his testimony will be the same and then submit him to cross-examination?"

In accordance with the court's suggestion plaintiff's called the two witnesses who testified that their testimony would be the same as that of the first witness, Hennegan.

While the defendant was testifying he was interrupted by the trial Judge with the remark that "there should have been a default in this case," and that he would continue it until the next day at twelve o'clock. On plaintiff's attorney saying that he would be before another judge at that time, the trial Judge said:

"If you want a verdict directed under the circumstances, considering there should have been a default, I will direct a verdict."

In response to the suggestion that the case might take a few more minutes, the Judge said: "This case ends at two o'clock," and directed the jury to bring in a verdict in favor of the plaintiffs for \$200.00, which was accordingly done, but the judgment entered on the verdict is for \$200.00. This was objected to, objection over-ruled and judgment entered on the verdict.

Subsequently a motion supported by affidavit was presented by counsel for the defendant, but the court instructed the clerk not to permit the affidavit to be filed and over-ruled the motion. When a bill of exceptions was presented the trial Judge refused to approve the same, and subsequently refused to sign any bill of exceptions. Mandamus proceedings were commenced which resulted in an order from the Supreme Court compelling the trial Judge to sign the bill of exceptions.

People ex rel. Pirela v. Lyle, 320 Ill. 418.

A mere reading of this brief summary of the proceedings demonstrates that defendant did not have a fair trial; in fact, he had no trial at all, as he was interrupted by the court before his defense was presented. It of course goes without saying, that litigants are entitled to a full and fair trial without undue interference from the trial Judge. The instant proceedings were conducted in violation of all the rights of the defendant and the judgment so obtained cannot stand.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Bissett, J., concur.

32687

McLANE VAN INGEN, Doing Business
as E. M. Vaningen & Co.,
Appellant,

vs.

SAMUEL A. SNITZER and SAMUEL A.
SNITZER, INC., a Corporation,
Appellees.

250 I.A. 641³

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks the reversal of an adverse judgment entered by the court in a fourth class, non-jury suit on contract.

The suit proceeded against Samuel A. Snitzer, Inc., and was for interest upon an open account at the rate of five per cent, plaintiff claiming that he is entitled to recover interest under Section 2, Chapter 74, Illinois Statutes, which provides that creditors shall be entitled to receive five per cent interest for all money withheld by any unreasonable and vexatious delay of payment. The defendant does not appear in this court to defend the judgment.

This identical case has heretofore been under consideration by this court. Vaningen vs. Snitzer, 244 Ill. App. 645. Upon the first trial the trial court entered a judgment for the defendant which was reversed upon the prior review and the cause remanded. The same result against the plaintiff followed upon the second trial. In the opinion filed upon the first review, it was held error to find the issues for the defendant, the opinion saying:

"Not only does the record show past due items of substantial amount, running for periods averaging over a year in extent, the plaintiff from time to time threatening to take some action and the defendants warding it off as frequently, by assurances of early payment of substantial amounts, which,

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in our opinion, would alone justify the allowance of interest, Daniels v. Saborn, 75 Ill. 615; Borden & Belleck Co. v. Fraser and Chalmers, 118 Ill. App. 605, but it appears from the record that these interest charges were shown on the statements sent to the defendants from time to time, and at least on several occasions these interest items were particularly called to the attention of the defendants in letters from the plaintiff, all without any dispute or protest. Such being the record, we are of the opinion the plaintiff made out a good case, and the defendant, Snitzer, Inc., (the plaintiff having abandoned any claim against Snitzer individually) should have been required to proceed with its proof, if it had any."

The plaintiff's evidence now before us is the same as before. Upon the second trial Snitzer, the president of the defendant corporation, testified that the first knowledge he had of any demands for interest was when this suit was filed. The present record, including the letters which were improperly excluded upon the second trial, insofar as the facts appear upon which to base our decision, is virtually the same as it was upon the prior review. It was then held that the evidence made out a case of unreasonable and vexatious delay. The additional evidence does not change the situation.

It therefore follows the judgment must be reversed and judgment for the plaintiff against the defendant is entered in this court for \$416.27.

REVERSED AND JUDGMENT FOR
PLAINTIFF FOR \$416.27 HERE.

O'Connor, F. J., and Hatchett, J., concur.

[illegible]

The Ministry's evidence was before me in the form of a letter. From the evidence which I received, the Government of the United Kingdom, I concluded that the United Kingdom was not in any breach of the Convention and that the United Kingdom was not in breach of the Convention. The evidence was before me in the form of a letter. From the evidence which I received, the Government of the United Kingdom, I concluded that the United Kingdom was not in any breach of the Convention and that the United Kingdom was not in breach of the Convention.

1. The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, regarding the land owned by the United States in the State of California:

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 07-21-00 BY 60322 UCBAW

32757

SOUTHWESTERN MILLING CO.,
Defendant in Error,

vs.

J. J. SANKSTONE,
Plaintiff in Error.

250 14 841⁴
ERROR TO CIRCUIT COURT OF
COOK COUNTY.

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, Southwestern Milling Company, bringing suit against defendant, Sankstone, as endorser upon two promissory notes for \$3,000 each, upon trial by the court had judgment for \$6432.95. Defendant seeks a reversal.

The notes were made by the Corbin Flour Company, a corporation, dated June 29, 1922, due July 1, 1923, and January 1, 1924, respectively, and each bears the endorsement of V. V. Corbin, who was the president of the Flour company, and of J. J. Sankstone, who was the attorney for the Flour company. The notes were given in consideration of the dismissal of two suits pending against the Corbin Flour Company and were executed, endorsed and delivered at the same time. Defendant testified that he represented the Flour company as its attorney and that the suits against it involved considerably more than the amount of the instant notes which he endorsed and that said suits were dismissed after the making, endorsing and delivering of the notes in question.

The defense asserted is an agreement by the plaintiff to pay him, Sankstone, ten per cent of the face of the notes as a consideration for his endorsement, that such consideration has not been paid, and the consideration having failed his contract of endorsement is therefore non-enforceable.

Counsel for the respective parties have with great industry and at length argued various propositions of law thought to be involved in the consideration of the issues presented. We do

not deem it necessary to discuss these propositions, for, even if we should accept the legal theory of the defendant, the facts established by the evidence render his theory of defense of no avail.

Defendant testified that plaintiff through its representatives agreed to pay him as a consideration for his endorsement ten per cent of the face of the notes and that nothing was said as to when this consideration was to be paid. Other witnesses who were present at the transaction gave testimony tending to prove that the agreement was not as he claims. Mr. Allen, an attorney acting for the plaintiff, testified that Mr. Hardenberg, the general manager of the plaintiff, requested Sankstone, the attorney representing the Corbin Flour Company, to endorse the notes; that Hardenberg said if Sankstone would endorse the notes the suits against the Flour company would be dismissed and plaintiff would pay Sankstone five per cent "when the notes were paid." Mr. Anthon, also present representing the plaintiff company, testified as to the conversation between Hardenberg and Sankstone, that after some considerable negotiations Hardenberg said if Sankstone would endorse the notes he would dismiss the suits against the Flour company and pay Sankstone five per cent "when the notes were paid." Hardenberg himself testified that, acting on behalf of plaintiff, he agreed to accept the two notes for \$3,000 each and to dismiss the pending suits against the Flour company and to pay Sankstone five per cent "when the notes were paid."

The only witness testifying to the contrary was the defendant, who stated "nothing was said about the time of payment."

The evidence of the defendant is weakened by the fact that he made no demand for payment of the consideration promised him until some seven months after the execution of the notes, when he wrote a letter to the plaintiff stating his view of the transaction. In it he stated that he had endorsed these two notes with the under-

standing that he "was to be paid 5% premium for my endorsement;" that this premium should have been paid when the notes were signed, and that he had as yet received no payment; he therefore informed plaintiff that on account of the failure of consideration he did not consider himself an endorser. The amount claimed in this letter is five per cent; on the trial he testified it was ten per cent. It was nearly seven months after the transaction that, for the first time, defendant claimed he was to receive "the premium" at the time the notes were signed. If his version was true, we would expect him to demand payment at once when the notes were executed and endorsed. No such demand was made. The circumstances tend to discredit his story and to confirm the testimony of plaintiff's witnesses that the five per cent was not to be paid until the notes themselves had been paid.

Upon the evidence presented the trial court could have arrived at no other conclusion than that the version of the plaintiff was amply supported by the evidence and that defendant's version failed of proof. The finding for the plaintiff was the only finding which could have been rendered under the evidence, and regardless of whether the plaintiff or the defendant correctly state the law applicable to the situation, the judgment is affirmed.

AFFIRMED.

O'Connor, S. J., and Hatchett, J., concur.

... ..

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

32812

E. B. PARKER and B. J. CASSELS,
Copartners Doing Business in the
Firm Name and Style of PARKER &
CASSELS,

Appellants,

vs.

HARVEY P. INGHAM, Trading in the
Name and Style of EXNER GARMENT
COMPANY,

Appellee.

250 I.A. 642

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McSHEELY DELIVERED THE OPINION OF THE COURT.

This is a case of the fourth class in the Municipal court, wherein plaintiffs sought to hold the defendant, Ingham, personally liable for certain commissions on goods sold by them as sales agents of the Exner Garment Company. The case was tried without a jury and the court entered judgment against the plaintiffs, which by this appeal they seek to have reversed.

Plaintiffs present the legal proposition that, where an agent contracts with another without disclosing his principal, the agent individually will be held liable, although he may, in fact, be acting for another. As a general proposition this may be accepted as true, but it is not applicable to the facts in the instant case.

January 15, 1926, plaintiffs made an agreement with H. E. Exner, trading as the Exner Garment Company, who was manufacturing men's working garments at Berlin, Wisconsin, by which the plaintiffs became the exclusive selling agents for Exner in certain specified territory, and pursuant to the agreement they secured orders for merchandise manufactured by Exner. April 10, 1926, plaintiffs received a letter on the letterhead of Ingham & Company, signed Ingham & Company by Harvey P. Ingham, president, which informed plaintiffs that Ingham & Company had become interested in the Exner Garment Company for the purpose of relieving the

W. L. VANDERBILT and E. A. VANDERBILT
 Defendants
 vs.
 ALBERT F. VANDERBILT, Plaintiff
 Name and Title of Court
 Defendant

2501 A. 642
 ALBERT F. VANDERBILT
 vs.
 W. L. VANDERBILT and E. A. VANDERBILT

1. THE PLAINTIFF ALLEGES THAT THE DEFENDANTS

ARE IN POSSESSION OF THE FOLLOWING PROPERTY:

1. A certain lot of land in the City of New York,

2. A certain lot of land in the City of New York,

3. A certain lot of land in the City of New York,

4. A certain lot of land in the City of New York,

5. A certain lot of land in the City of New York,

6. A certain lot of land in the City of New York,

7. A certain lot of land in the City of New York,

8. A certain lot of land in the City of New York,

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18. A certain lot of land in the City of New York,

19. A certain lot of land in the City of New York,

20. A certain lot of land in the City of New York,

21. A certain lot of land in the City of New York,

latter company from embarrassment arising out of its failure to complete orders. April 13th plaintiffs wrote to Ingham & Company acknowledging receipt of this letter and inquiring in what capacity it was associated with the Exner Garment Company. April 16th Ingham & Company replied in a letter signed Ingham & Company by Harvey P. Ingham, president, written on the letterhead of Ingham & Company, saying that the nature of their business was corporate re-organization in order to enable "worthy corporations" to regain their proper position in the trade. The letter further said, in substance, that the embarrassment of the Exner Company was caused in part by Mr. Exner doing business as an individual, and that they proposed to assist him in the operation of the Exner Garment Company "as a corporation rather than as an individual ownership." Subsequently, on June 8, 1926, Exner by bill of sale which was duly recorded sold his entire plant, stock, merchandise and materials to "Ingham & Company, a Wisconsin corporation." Later Ingham & Company went into bankruptcy and this suit was brought against Harvey P. Ingham personally to recover commissions due plaintiffs for orders of merchandise formerly manufactured by Exner.

The evidence sufficiently establishes the fact that Harvey P. Ingham was acting merely as the agent of Ingham & Company, a Wisconsin corporation, and that plaintiffs were informed of this. Although Ingham had certain interviews with plaintiffs, they were only as representing Ingham & Company, and at no time did he personally agree to pay the plaintiffs or assume the contract entered into between them and Exner. Neither is there any evidence that he derived or appropriated to himself any benefits from the orders procured by plaintiffs. Applicable to the situation is the statement by Bechem on Agency, Sec. 1406, p. 1037:

"If the agent makes a full disclosure of the fact of his agency and of the name of his principal, and contracts only as

[illegible]

IT IS THE POLICY OF THE UNITED STATES GOVERNMENT TO OPPOSE SUCH DISCRIMINATION AND TO ENFORCE THE ANTI-DISCRIMINATION LAWS OF THE UNITED STATES.

the agent of the named principal, he incurs no personal responsibility. The insolvency of the principal or his inability or refusal to perform the contract does not affect this result." Citing Durham v. Stubbings, 111 Ill. App. 10; Scaling v. Snellin, 94 Ill. App. 443.

It is suggested that the acquisition by Ingham & Company of the business of Exner was ultra vires. This point was not raised in the trial court and cannot be considered now. Demmer v. American Ins. Co., 110 Ill. App. 580. But even if Ingham & Company had no power under its charter to acquire the Exner business, we do not see how it follows that Harvey P. Ingham personally can be held liable under the Exner contracts.

It is urged as reversible error that the trial court refused to pass upon eleven propositions of law submitted to it by plaintiffs. Proper practice requires that the trial court should mark propositions of law submitted to it either refused or held. Examination of the propositions shows that most of them might well have been marked refused, as they assume the existence of facts in dispute. If the evidence is sufficient to sustain the court's judgment under the law applicable thereto, we will not reverse merely because the court failed to mark the propositions submitted to it. Chicago Union Traction Co. v. City of Chicago, 202 Ill. 576; Roberts v. Cat-Bak Mfg. Co., 216 Ill. App. 245; Sleph v. Grossman, 192 Ill. App. 67. Furthermore, a judgment in a fourth class case will not be set aside if substantial justice has been done. Inter Ocean Cabinet Co. v. Laughlin, 169 Ill. App. 550; Finch v. Wisconsin Dairy Farms Co., 167 Ill. App. 400; Empire State Surety Co. v. Schillinger Bros, 167 Ill. App. 632.

We hold that the conclusion of the trial court was proper under the evidence and its judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Hatchett, J., concur.

32834

EMMA CHVATAL,
Appellee,

vs.

METROPOLITAN LIFE INSURANCE
COMPANY,
Appellant.

69832
250 I.A. 642
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MCGHEEY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit upon a life insurance policy issued by the defendant upon the life of her daughter, Vlasta Chvatal, upon trial by the court without a jury had a judgment for \$1,000, from which defendant appeals. The plaintiff does not appear in this court to defend her judgment.

The defense asserted that the insured, Vlasta Chvatal, in her application for the policy made false statements as to the condition of her health which were material and were made for the purpose of deceiving the company in order to obtain the policy.

The policy was dated March 14, 1927, and the insured died September 12, 1927. In the application for a policy, in answer to the question whether she had any physical or mental defect or infirmity, Vlasta Chvatal answered "No." She also answered that she had no medical attendant or physician prior to the date of the application and that she had never suffered certain complaints or diseases such as insanity, fits or convulsions, paralysis or spinal diseases, and that she had not been attended by any physician during the last five years prior thereto and had never received any treatment within the last five years at any dispensary, hospital or sanitarium.

It is not controverted that the facts were that from October 7, 1926, until December 16, 1926, she was confined in the Chicago State hospital, commonly known as Dunning, which is a

Handwritten signature and initials at the top of the page.

STOUT, A. O. S. (mirrored text)

STOUT, A. O. S. (mirrored text)

STOUT, A. O. S. (mirrored text)

THE FOLLOWING IS A SUMMARY OF THE RESULTS OF THE SURVEY... (The rest of the page contains mirrored text from the reverse side, including dates like 'October 11, 1907' and 'October 12, 1907', and various statistical figures.)

hospital for insane people and those suffering from nervous diseases, where her disease was diagnosed as epilepsy, psychosis, or epileptic deterioration; that persons suffering from this disease suffer a gradual deterioration of the mind; that she later went to Dunning on July 28, 1927, and was there until the date of her death, September 12, 1927. There was evidence that she had been suffering from epilepsy for a considerable time and the cause of her death was epilepsy.

There was some attempt to show that the insured signed the application in blank and that the answers were filled in subsequently by defendant's agent, but this was not established. The agent and the medical examiner both testified that the answers were written in the application before the applicant signed it and the insured certified this to be the fact, as appears by the certificate upon the application.

The record indicates that plaintiff admits that these answers are untrue, but it is suggested that the agent knew they were untrue, and that the knowledge of the agent was the knowledge of the defendant company, hence defendant must be held to have waived the provisions of the policy and is estopped by the conduct of its agent to set up the defense alleged in its affidavit of merits. Plaintiff testified that she was present when the application was signed; that the insured was not in good health; that she had been in the hospital for the insane; that in 1926 the insured made an application for insurance to this same defendant company, which was refused, but that the insured was urged by the agent "to try again" and was induced by him to do so.

The trial Judge was evidently of the opinion that the company had been deceived, but apparently based his conclusion that defendant was liable on the proposition that the deception of defendant was by its agent and therefore the company was bound.

provided for income tax and were collected from various sources, which was known and allowed as ordinary, especially, as objects of investigation; and persons collecting from the same source a fixed percentage of the whole; that the law was passed during the year 1877, and was known until the end of the year 1877, when the evidence was taken and the law was passed from object for a considerable time and the same as the same was collected.

There was also a law in the year 1877, which was passed during the year 1877, and was known until the end of the year 1877, when the evidence was taken and the law was passed from object for a considerable time and the same as the same was collected.

The law was passed during the year 1877, and was known until the end of the year 1877, when the evidence was taken and the law was passed from object for a considerable time and the same as the same was collected.

The law was passed during the year 1877, and was known until the end of the year 1877, when the evidence was taken and the law was passed from object for a considerable time and the same as the same was collected.

If it is true that both the insured and the plaintiff and the agent of the company and the medical examiner knew that the applicant was in poor health and knew of her prior confinement in an insane asylum, and, having such knowledge, inserted false statements in the application, they were all guilty of collusion to defraud the company, and under such circumstances their knowledge cannot be imputed to the company and the company is not bound by it. This is based upon the presumption that an agent engaged in defrauding his principal will not communicate knowledge of the fraud to his principal, and the presumption that a company has knowledge of facts which are within the knowledge of its agent does not protect the wrong-doer who was a party to the fraud. There are a number of cases supporting this proposition, among which are Mutual Life Ins. Co. v. Hilton-Green, 241 U. S. 613; McCormack v. Security Mutual Life Ins. Co., 220 N. Y. 447; Carlson v. Metropolitan Life Ins. Co., 221 Ill. App. 354; Franklin v. Metropolitan Life Ins. Co., 236 Ill. App. 645; Rockford Ins. Co. v. Nelson, 65 Ill. 413. In this last case the court said that to hold otherwise "would put these organizations completely at the mercy of dishonest and unscrupulous agents."

Upon the record before us the plaintiff is not entitled to recover under the policy. The judgment is therefore reversed and as the case was tried by the court without a jury, judgment of nill capiat will be entered in this court.

REVERSED AND JUDGMENT OF
NILL CAPIAT ENTERED.

O'Connor, P. J., and Hatchett, J., concur.

[illegible]

32843

THE WISCONSIN STATE BANK,
a Corporation,
Appellant,
vs.
JOE PREVOLSEY,
Appellee.

6984
250 I.A. 642³
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MASURELY DELIVERED THE OPINION OF THE COURT.

The plaintiff Bank had a judgment for \$479.50 entered by confession under a power of attorney contained in a \$400 judgment note signed by the defendant, payable to the order of Leuffgen Auto Sales and endorsed by it. On motion of the defendant, supported by affidavit, the judgment was opened and leave given to defend, the affidavit standing as an affidavit of merits to plaintiff's claim. Upon the trial by the court without a jury, the issues were found against the plaintiff and the judgment by confession was vacated and judgment rendered against plaintiff, who appeals.

The defense asserted that the execution of the note by defendant was obtained by fraud or circumvention and that under the statute, chapter 98, Negotiable Instruments, section 11, this defense may be pleaded in bar to any action whether brought by the party committing the fraud or by any assignee of such instrument.

The affidavit filed by defendant, which his testimony tends to support, in substance alleges that on December 24, 1926, he purchased a Willys-Knight sedan from J. A. Leuffgen, doing business as Leuffgen Auto Sales, for the price of \$1700; that he traded in a Hudson coach for which he was allowed a credit of \$800; that he paid \$200 in cash; that it was agreed between him and

2501A-442

THE NATIONAL BUREAU OF INVESTIGATION

WASHINGTON, D. C.

TO THE DIRECTOR, FBI
FROM THE SAC, NEW YORK
SUBJECT: [illegible]
RE: [illegible]

RE: [illegible]

The following information was received from [illegible]

[illegible text block]

The following information was received from [illegible]

[illegible text block]

The following information was received from [illegible]

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Leuffgen that the balance of \$700 should be evidenced by 14 notes of \$50 each, payable monthly after date, to be secured by a chattel mortgage on the new car; that the first 12 of these were to be delivered to Githens Bros. Company, an automobile financing company, and the last two to the Roseland State Savings Bank; that the notes and chattel mortgage were presented to him, which he examined and saw that there were 14 notes, each dated December 24, 1926, for \$50 each, falling due 30 days apart consecutively; that he also examined the chattel mortgage with a chattel mortgage note for \$600 attached; that the chattel mortgage and note ran to Walter L. Githens; that he was handed a fountain pen and was about to sign the papers when he was called away by Leuffgen to another room for the purpose of looking at some improvements on the car; that he returned in five or ten minutes and sat down to sign the papers; that the notes were in plain view as they were when he left them and looked like the same notes and that he signed his name to each of them. He charges that the note for \$400 - the note which is in issue here - was fraudulently substituted for one of the \$50 notes, and that he signed it thinking he was signing a \$50 note.

The \$400 note in question is dated December 24, 1926, and was discounted December 27th with the plaintiff bank, with which Leuffgen had an account. The \$400 was placed to his credit. There was evidence that plaintiff had no knowledge of the circumstances under which the note was given nor any notice of any defenses.

At the same time that defendant signed the note in question and purchased the car, namely, December 24, 1926, he received from Leuffgen a bill of sale, which recites the terms of sale as \$200 cash, \$800 allowance on the Hudson coach, six

...that the balance of \$100 should be returned to it before
of the same, possibly within a few days, he is advised by a check
for mortgage on the new one; that the first is of value only in
delivered to William Green, Company, an automobile financing com-
pany, and the last to the Western State Building Bank; that
the notes and related mortgage were presented to him, when he
examined and saw that there were 14 notes, each dated December
21, 1930, for \$50 each, totaling \$700. He is now not remembering
that he also received the related mortgage with a related mortgage
note for \$100; that the related mortgage was with the
Western State Building Bank; that he was advised by William Green
to sign the mortgage and he was called away by another person
before he had the opportunity to do so; that he was advised by
them for the purpose of securing a loan of \$100 from the bank;
that he returned in time as he was advised and was told to sign the
papers; that the notes were in plain view as they were then in 1930
then and looked into the same folder and that he signed the same in
each of them. He explains that the note for \$100 - the note which
is in issue here - was intentionally substituted for one of the
\$50 notes, and that he almost is thinking he was signed a \$50
note.

The \$100 note in question is dated December 21, 1930,
and was presented to him with the following text, which
with the following text as recorded. The \$100 note placed in the folder.
There was evidence that William Green had no knowledge of the above.
reference made with the note was given him and he signed it and the
Lumber.

At the time when the related mortgage was made in
question was presented to him, namely, December 21, 1930, he
received from William Green a bill for notes, which states the total
of \$100 each, thus amounting to the \$1000 notes, six

notes at \$350 each and one note due in six months at \$400. This totals \$1700, which is the price of the new car. The \$600 chattel mortgage note payable to Githens is dated December 31, 1926, which would be a week after defendant purchased the car. Inspection of this note shows that it is on a different form from that of the \$400 note dated December 24th. The chattel mortgage securing the \$600 note is also dated December 31, 1926, and attached to it is a power of attorney appointing an attorney in fact to make acknowledgment in the name of the mortgagor before the clerk of the Municipal court, and this also is dated December 31st; the certificate of acknowledgment which follows, made by Edward L. Parkes, notary public, is also dated December 31, 1926.

The cashier of the Roseland State Savings Bank testified that his bank, on December 27th, discounted for the Leuffgen Auto Sales the six notes made by the defendant for \$500 each, dated December 24, 1926. These are evidently the six notes for \$500 each referred to in the bill of sale.

Another witness, Hillstrom, testified that he was president of the Illinois Home Finance Corporation; that he was acquainted with J. W. Leuffgen and that in December, 1926, he bought a chattel mortgage note from Leuffgen's representative, a Mr. Goldsmith, purporting to be signed by defendant, dated December 28, 1926, and that he still held the note, which had been partially paid by the Leuffgen Auto Sales. He also testified that defendant denied that the signature on this note was his signature.

A bookkeeper for Githens Bros. Company testified that his company purchased a chattel mortgage note for \$600, made by defendant, sometime after December 31, 1926.

About a week after purchasing the car defendant received notice from Githens Bros. Company to make all payments

to them. Defendant, however, made his payments to Leuffgen, who was to pay Githens. Defendant made four monthly payments of \$50 each to Leuffgen in January, February, March and April. In the meantime he was receiving monthly notices from the Roseland State Savings Bank that his notes were due at that bank, and each time he took the matter up with Leuffgen, who said there was some mistake about it. The notes maturing January, February and March at the Roseland bank were paid, but the evidence does not disclose by whom. In May, 1927, Leuffgen disappeared and it is said he is a fugitive from justice. Subsequently defendant made payments to Githens on his notes and also paid the notes falling due at the Roseland State bank in May and June, 1927.

Defendant was 45 years old, connected with the Roseland State theatre, and testified that he had no difficulty about reading, that his eyesight was pretty good and that he was able to understand what he read.

It is reasonably certain from the evidence that Leuffgen perpetrated a fraud upon the defendant in securing his signature to certain notes and probably in selling paper which bore defendant's forged signature. However, it is not clear that there was any fraud in connection with the particular note in question. The documentary evidence tends to prove to the contrary. The execution and delivery of the six notes of \$50 each, dated December 24, 1926, and the execution and delivery on the same date of the \$400 note, with the delivery of the bill of sale on the same date completed the transaction of the purchase of the automobile. The \$400 note was discounted by the plaintiff bank within three days after its date. Defendant kept in his possession the bill of sale, which recited the execution of the \$400 note, and exhibited the same to Mr. Wiersena, one of the officials of the plaintiff

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bank, when the bank notified him of the maturity of his \$400 note. Upon the face of the papers, the chattel mortgage note for \$600, dated December 31st, and the chattel mortgage securing the same running to Oithens, is a different and separate transaction, taking place a week later than the transaction which gave rise to the \$400 in question and three days after plaintiff had acquired this \$400 note.

Defendant's testimony is open to doubt. He testified that he knowingly signed the \$600 chattel mortgage note, dated December 31, on December 24th at the same time he signed fourteen other notes which he thought were for \$50 each; that would be notes to the amount of \$1300, and this with the allowance of \$300 for his old car and the cash payment of \$200 would make the new car cost him \$2300. It is undisputed that the price of the new car was \$1700.

We are not content to allow the judgment to stand. A Mr. Goldsmith was associated with Leuffgen in the transaction, and his testimony should be had, also the testimony of the notary public, Parker, should be produced, and perhaps Leuffgen himself can be located.

It is a well settled rule that after fraud is charged it must be proved by evidence so clear and cogent as to leave the mind well satisfied that it is true. Raylin v. C. A. & Del. R.R. Co., 297 Ill. 130; Carter v. Carter, 283 Ill. 324; McKenna v. Nickelberry, 242 Ill. 117. It has also been held that where suit has been brought by an assignee, fraud in the execution of the note will be no defense if the maker did not exercise due care to prevent the fraud. Murray v. Metropolitan Trust & Sav. Bank, 159 Ill. App. 473.

There is force in the suggestion by plaintiff that defendant was willing to sign notes for \$700 in payment of the balance due on his automobile and that he did actually sign notes to this amount.

The defendant asserts in this court, for the first time, that the plaintiff bank, in discounting the note for a depositor who is not indebted to the bank, did not become a purchaser of the same by merely placing the proceeds to the credit of the depositor's account. (1) Such a defense was not presented in either defendant's affidavit of merits nor upon the trial; and (2) the presumption of law is that the plaintiff was a holder in due course and the burden is upon the defendant to show that the payee was not in fact indebted to the plaintiff or that the amount credited on the account had not been drawn out prior to the trial. Warman v. First Nat'l Bank, 185 Ill. 60.

For the reasons above indicated we hold there should be another trial, and the judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Hatchett, J., concur.

There is also in the suggestion for slightly less
information was added to the notes for 1900 in regard to the
balance due on his indebtedness and that he is actually able to pay
in this amount.

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line, that the statement book in it covering the year for a
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[1] the statement is for the year the statement was a quarter in
the year and the balance is what the statement is for the year
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be correct total, and the balance in the year for which he
some amount.

THE BALANCE FOR THE YEAR 1900.

THE BALANCE FOR THE YEAR 1900.

32864

25014642

C. MALLOW,
Appellee.

vs.

E. H. CARLSON,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MCGURELY DELIVERED THE OPINION OF THE COURT.

In an action of the fourth class seeking to recover compensation for work and material, upon trial by the court plaintiff had judgment against defendant Carlson for \$239.21, from which he appeals.

The action seems to have been originally brought against Carlson and Mrs. H. L. Preston, alleging joint liability. Defendant now says that, where joint liability is charged recovery cannot be had against one only of the defendants, citing Umlauf v. Chasamas Iron Prod. Co., 209 Ill. App. 291. There is no doubt of this as a general proposition, but the case cited indicates the proper practice, namely, the dismissal of the defendant not liable and amending the declaration accordingly. The record shows that this was done in the instant case. Mrs. Preston was dismissed and the statement of claim amended accordingly. This was proper practice.

This is an action of the fourth class, where pleadings are not essential and the action is what the proof makes it. Paris Flouring Co. v. Imperial Cotton Milling Co., 181 Ill. App. 215; Gans v. Lincoln Stars, 209 Ill. App. 400; Edgerton v. C. & N. W. Ry. Co., 240 Ill. 311. The evidence is not in the record before us, so we must assume that the proof made out a case of several liability of the defendant Carlson.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Hatchett, J., concur.

2501 A. B-12

12345

UNITED STATES DISTRICT COURT

IN BANKRUPTCY

C. B. BAKER, Debtor.

vs.

E. E. BAKER, Appellant.

THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF COLUMBIA.

In an action of the Court of the District of Columbia, commenced by the Plaintiff, E. E. Baker, against the Defendant, C. B. Baker, for the recovery of the sum of \$100.00, the Court has rendered judgment against the Defendant, C. B. Baker, in the sum of \$100.00, with interest thereon from the date of the rendition of the judgment until the date of payment thereof.

The action was commenced by the Plaintiff, E. E. Baker, against the Defendant, C. B. Baker, on the 1st day of January, 1911, in the Court of the District of Columbia, in and to the effect that the Defendant, C. B. Baker, had received from the Plaintiff, E. E. Baker, the sum of \$100.00, and that the Defendant, C. B. Baker, had failed to pay the same to the Plaintiff, E. E. Baker, on demand.

The Court has rendered judgment against the Defendant, C. B. Baker, in the sum of \$100.00, with interest thereon from the date of the rendition of the judgment until the date of payment thereof. The Court has also rendered judgment against the Defendant, C. B. Baker, in the sum of \$10.00, as costs of the action, to be paid by the Defendant, C. B. Baker, to the Plaintiff, E. E. Baker, on the day of the rendition of the judgment.

Done.

This is to certify that the Court of the District of Columbia, in and to the effect that the Defendant, C. B. Baker, had received from the Plaintiff, E. E. Baker, the sum of \$100.00, and that the Defendant, C. B. Baker, had failed to pay the same to the Plaintiff, E. E. Baker, on demand. The Court has rendered judgment against the Defendant, C. B. Baker, in the sum of \$100.00, with interest thereon from the date of the rendition of the judgment until the date of payment thereof.

The judgment is affirmed.

ATTEST.

E. E. Baker, Plaintiff, by his attorney, J. E. Baker.

32867

FRANCIS PUSATERI,

Defendant in Error.

vs.

ABRAHAM W. KITTEER et al.,

Plaintiffs in Error.

69 250 18.342
ERROR TO SUPERIOR COURT OF
COOK COUNTY.

MR. JUSTICE McSHEEHY DELIVERED THE OPINION OF THE COURT.

In an ex parte trial of an action in tort for injuries to the person, plaintiff had judgment for \$500, which defendant by this writ of error seeks to have reversed. The plaintiff does not appear in this court to defend her judgment.

Suit was brought March 1, 1926. On March 11, 1927, it was dismissed for want of prosecution. October 3, 1927, after six terms of court had gone by, the cause was, without any notice to defendant, reinstated and thereafter, on January 16, 1928, the defendant not being present, trial was had resulting in a verdict and judgment of \$500.

It has been many times held that after the term has gone by the court is without jurisdiction to reinstate the cause or enter any orders therein except pursuant to Section 89 of the Practice act. Tosetti Brewing Co. v. Koehler, 200 Ill. 369; Mooney v. Valentynevicz, 255 Ill. 113; Loker v. Lizenby, 245 Ill. App. 575.

As the order reinstating the cause was improperly entered, the judgment is reversed.

REVERSED.

O'Connor, P. J., and Hatchett, J., concur.

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32880

PAUL KIUSAS,
Appellant,

vs.

SOPHIA PETRAUSEAS, also known
as Sophia Yucius, and JOHN ROE,
Appellees.

6987a
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

2501A.643

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks the reversal of an order vacating and setting aside an order entered at a prior term of court dismissing this cause.

The action was in replevin. The declaration was duly filed, and appearance and pleas were filed by the defendant. On February 2, 1928, which was in the January term of the Superior court of Cook county, an order was entered as follows:

"This cause being called for trial and neither party appearing to prosecute this suit in their behalf on motion of Court, it is ordered that this cause be and the same is hereby dismissed without costs for want of prosecution."

February 17, 1928, which was in the subsequent February term of said court, an order was entered as follows:

"On motion of defendant's attorney, it is ordered that the order herein entered on February 2nd, 1928, dismissing this cause without costs for want of prosecution be and the same is hereby vacated and set aside and this cause re-instated and placed on the trial call."

On the day after this order was entered a document was filed by one of the attorneys for the defendant which cannot be considered, as it was not filed until after the order which is the subject of this appeal was entered.

At the same term of court plaintiff made a motion to vacate the order of February 17, which motion was denied. This appeal is from the order of February 17. The defendant does not appear in this court to defend this order.

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The within was in reference to the following: The following was filed:

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The subject of this report was interviewed by Special Agent [redacted] on [redacted] at [redacted]. The subject stated that he had been employed by [redacted] from [redacted] to [redacted]. During this period, he worked as a [redacted] and was responsible for [redacted]. He also mentioned that he had been involved in [redacted] activities during his employment.

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term of court, it is without jurisdiction to vacate an order of dismissal except upon a written motion or petition under Section 89 of the Practice Act, and that this section can be invoked to correct errors of fact only. The proper practice is that upon the filing of such written motion or petition, the opposing party should be ruled to demur or answer and the existence or non-existence of the facts alleged may be established by evidence. In the case at bar there was nothing before the court on February 17th as a basis for the entry of the order. Among the cases stating the proper practice are Gray v. Ames, 220 Ill. 251; Barnes v. Chicago City Ry. Co., 185 Ill. App. 148.

For the reasons indicated the order entered on February 17, 1928, is reversed.

REVERSED.

O'Connor, P. J., and Hatchett, J., concur.

32681

MRS. HATTIE KLAUSER,
Appellee,

vs.

FELIX R. MELESKI,
Appellant.

2581 A. 343²
APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a judgment in tort for conversion in the sum of \$711 entered upon the verdict of a jury, after motions for a new trial and its arrest had been over-ruled.

Plaintiff owned a garage at 4410 North Clark street, Chicago, and held a lease of the premises from one Rabinovitz at a rental of \$325 a month. She transferred the garage and personal property therein to defendant Meleski by bill of sale on November 9, 1925, for a consideration of \$5,000; \$1,000 was paid in cash, \$1,000 in judgment notes, and the defendant executed and delivered a note for \$3,000, secured by a chattel mortgage on the property conveyed for the balance. The chattel mortgage contained the usual covenants.

Mrs. Klauser did not assign the lease to Meleski, but apparently held it as security. The defendant took possession of the garage but did not pay rent for December as he had agreed to do, and the landlord, Rabinovitz, sued both plaintiff and defendant for possession. The defendant was in actual possession after the sale through one Rasmussen, who (there is some evidence tending to show) was a partner of defendant. When the suit for possession came up Meleski defaulted, and the matter was continued from time to time.

December 17th plaintiff and defendant entered into a writing which was designated as an escrow agreement and which was deposited with the attorney for the defendant. By its terms the

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FORM NO. 10 (REV. 1-65) GSA GEN. REG. NO. 27

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the investigation. The investigator must identify the problem and the scope of the investigation. The next step is the collection of data. This is done by the investigator who is responsible for the investigation. The investigator must collect data from the sources that are available. The next step is the analysis of the data. This is done by the investigator who is responsible for the investigation. The investigator must analyze the data and determine the cause of the problem. The next step is the development of a solution. This is done by the investigator who is responsible for the investigation. The investigator must develop a solution that will solve the problem. The next step is the implementation of the solution. This is done by the investigator who is responsible for the investigation. The investigator must implement the solution and monitor the results. The final step is the evaluation of the results. This is done by the investigator who is responsible for the investigation. The investigator must evaluate the results and determine if the problem has been solved.

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was a subject of discussion. From the city the government sent a
military expedition, and the subject was discussed from 1920.
According to the official and military records there is a
visit which was designated as an action against the city and
associated with the situation in the government. In the case of

chattel mortgage, notes and check of plaintiff for the sum of \$175 were deposited with this escrow agreement, which provided that if the landlord accepted the rent of \$325 which Mrs. Klausner was about to tender, these documents should be delivered to Meleski upon the termination of the suit for possession in plaintiff's favor. To that end Meleski agreed to render all assistance in his power to Mrs. Klausner in connection with the forcible detainer suit and further agreed to return two welding machines to the garage by December 18th. The default of Meleski in that suit was then set aside. The landlord accepted the tender of the rent and the suit was dismissed. Later the papers which were in escrow, including plaintiff's check, were delivered to Meleski. The plaintiff then took possession of the premises.

Plaintiff gave evidence upon the trial tending to show that considerable items of the personal property secured by the chattel mortgage disappeared from the garage, and her suit was brought upon the theory that defendant while in possession converted this property to his own use. Defendant denied the conversion of the property, and as a further defense set up that the escrow agreement amounted to an accord and satisfaction which precluded a recovery by plaintiff.

Defendant contends in the first place that the evidence was wholly insufficient to justify the verdict of the jury. He says that there was no evidence, direct or circumstantial, tending to show that Meleski removed, or caused to be removed, any of the property. The evidence, however, does tend to show that the defendant received these items of property and that the same disappeared while he was still in possession of the premises. The duty of properly caring for the property was upon defendant, and the evidence fails to show that defendant complied therewith.

Rabinovitz testified that Rasmussen said "he was going to move the tools out, that is what he said, if she does not give him back his thousand dollars." The defendant objected to this evidence upon the ground that Meleski was not bound by the statement of Rasmussen. The court over-ruled this objection and, it is urged, erred in so doing.

There was evidence in the record tending to show that Rasmussen was the partner of defendant. The contention of defendant that proof of the partnership rests on a supposed statement of Rasmussen to Rabinovitz is not sustained by the record, which shows that Rabinovitz testified that Meleski made the statement that Rasmussen was his partner. We think the evidence was therefore admissible, and being admissible the jury could find from this and other evidence that defendant was in fact guilty of converting the property.

It is next urged that the plaintiff knew of the disappearance of the converted property before executing the escrow agreement, and it is argued that since that agreement was made and carried out with such knowledge on the part of plaintiff, it amounted to an accord and satisfaction. It is true that the evidence shows that plaintiff had knowledge that the property had disappeared prior to the execution of this agreement, but the record also discloses (we think, without contradiction) that Meleski denied that he had anything to do with its disappearance. The escrow agreement does not seem to cover any question between the parties with reference to this property. Meleski emphatically denied that he had taken it. The jury finds against him.

Plaintiff argues, on the authority of Ill. Glass Co. v. Chicago Tel. Co., 234 Ill. 535, that the escrow agreement was obtained under circumstances which amount to moral duress. There is no merit in this contention, and moreover plaintiff has taken no steps to rescind the agreement. We hold, however, that the

agreement does not cover the property for which this judgment was rendered; that the jury could properly find from competent evidence in the record that defendant in fact converted the property, and the judgment is therefore just.

For that reason it is affirmed.

AFFIRMED.

O'Connor, F. J., and McDurely, J., concur.

statement also was made that property for which this judgment was
 rendered; that the said property was then conveyed to the
 same in the month of January in last mentioned year, and
 was then conveyed to the said party.

The said party is a citizen.

WITNESSES

Witness, J. L. and J. L. and J. L.

32690

VINCENZO LAMONEA,
Appellant,

vs.

MAX BEREZIN,
Appellee.

6789
2501.4.13³
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The subject matter of this litigation is a note and trust deed made by Angelo Vozzella and Angeline, his wife, of June 8, 1930, and by them delivered to Vincenzo Lamonea, the appellant.

Max Berezin claims ownership to the same by assignment from one Morris, who purchased from J. H. Prentice. Lamonea averred in a bill filed by him that Prentice was under contract to construct a building for Lamonea and agreed that when this building was ready for the roof he would accept this note on which there was a balance then due of \$2,250 in part payment; that before that time Prentice obtained the securities from Lamonea by fraud and misrepresentation to the effect that the same were desired only for the purpose of exhibiting the same to certain material men in order to obtain credit, agreeing to return the securities to Lamonea, which he did not do.

Berezin filed a bill to foreclose. The cases were consolidated, put at issue and referred to a master who reported in favor of Berezin, and the chancellor, over-ruling exceptions, entered a decree dismissing the bill of Lamonea and granting foreclosure to Berezin. The Vozzellas, makers of the securities, acquiesced in the decree. Lamonea prosecuted this appeal.

It is contended, first, in Lamonea's behalf that neither Berezin nor Morris, from whom Berezin purchased these

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1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

1. *Journal of Management Studies*, 1995, 32, 1, 1-14.

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For other information, contact the author at the address below.

Fig. 3. The same as in Fig. 2, but for the case of a constant temperature of the medium.

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References

See *Journal of the American Statistical Association* 81: 104-110, 1986.

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There are two main reasons why the results of this study are important. First, the results show that the use of a single, standardized measure of social support is not sufficient to capture the complexity of social support. Second, the results show that the use of a single, standardized measure of social support is not sufficient to capture the complexity of social support.

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and others have estimated the effect of different variables on the probability of a firm's going public.

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Journal of Management Inquiry 22(1) 3-14

securities, acquired title for the reason that the note was not endorsed by Angeline Vossella, one of the makers. This contention may not properly be argued upon this record. The pleadings of Berezin alleged, while those of defendant admitted, the endorsement and delivery of the note by the makers. Having tried the case upon that theory, Lamonea cannot now be heard for the first time to the contrary.

The note was for the principal sum of \$2,750. \$500 was paid upon the principal to Lamonea, and an endorsement made on the date of the payment appears upon the back of the note as follows: "Bal. \$2,250 due." Just below this endorsement appears the signature, "Vincenzo Lamonea."

It is urged that the effect of this endorsement was to make the note payable only to Lamonea and that the title to the note could not have been subsequently acquired by Morris, or by Berezin from Morris, in the absence of a further endorsement in full or in blank by Lamonea. No such issue as this was presented by the pleadings in the trial court. This contention also, we think, cannot be made here for the first time. There is no evidence in the record tending to show the intention of Lamonea in writing his name upon the note.

It is argued on the authority of Walker v. Devent, 42 Ill. 372, that the fact that the name of Lamonea appeared thus upon his note cast upon the purchaser of these securities the duty of making inquiry as to the rights and equities of Lamonea. This case does not sustain that contention, but holds that it was negligence in a purchaser of similar securities not to inquire of "all the parties whose names originally appeared on the paper."

The rule announced in Olds v. Cummings, 31 Ill. 182, and followed in later cases (see Pittsburg Plate Glass Co. v.

Kraner, 291 Ill. 841 to the effect that the assignee of a mortgage takes the same subject to defenses which would have been available against his assignor, does not extend to latent equities of third persons. Peaseock v. Phillips, 247 Ill. 467; Schultz v. Brodlewitz et al., 191 Ill. 249. Indeed in Sherman State Bank v. Smith, 244 Ill. App. 171, the third division of this court held, after a review of the authorities, that an innocent holder of a note and trust deed would be protected even though the securities were purchased from one who was guilty of larceny in obtaining them.

It is not necessary to go that far to uphold the present decree. The rule that as between two innocent persons he who first trusted the deceiver and made it possible for him to do a wrong must bear the loss, is clearly applicable and compels an affirmance. Anderson v. Wams, 71 Ill. 20; Keckane v. Smith et al., 97 Ill. 156; Miller et al. v. Larned et al., 103 Ill. 562; First Nat'l Bank of Joliet v. Adam, 138 Ill. 423; Wilcox v. Tetherington, 103 Ill. App. 404; Milwaukee Harvester Co. v. Gladden, 106 Ill. App. 319; Sill v. Pate, 133 Ill. App. 423.

Moreover, an examination of the evidence discloses that Lamonea permitted the assignees for several years to collect the interest on this mortgage without protest, which tends strongly to show that he acquiesced in the transfer of these securities by Prentice.

For the reasons indicated the decree is affirmed.

AFFIRMED.

O'Connor, W. J., and McSurely, J., concur.

32786

CITY NATIONAL BANK OF EVANSTON,
Petitioner and Administrator,
Appellee,

vs.

CHARLES A. ROHRER,
Appellant.

6990
250 I.A. 643
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Melville L. Rohrer of Evanston, Illinois, died intestate August 4, 1926, leaving him surviving as his only heirs at law and next of kin his widow, Mary A. Rohrer; his son, Charles A. Rohrer, the respondent and appellant; Ralph Homrig, child and heir-at-law of Florence Homrig, a daughter of Melville L. Rohrer, deceased, who died before his death.

On September 15, 1926, the petitioner was appointed administrator of the estate. Thereafter the widow filed her petition in the Probate court, alleging therein that the son and respondent, Charles A. Rohrer, had in his possession and was then withholding from the administrator about \$21,000 worth of securities which belonged in fact to the estate of the deceased, and praying for an order to turn the same over to the administrator. A citation issued as provided by section 82, Chapter 3 of the Revised Statutes. The Probate court heard the evidence and entered an order granting the prayer of the petition. Appeal was taken by the respondent to the Circuit court of Cook county, where there was a trial de novo, the parties waiving a jury and agreeing to submit the matter in issue to the court.

The Circuit court also found that these securities were the property of the estate and ordered the respondent to turn the same over to the administrator, and from that order this appeal is prosecuted by the respondent.

8501.A.643

OFFICE OF THE ATTORNEY GENERAL

OF THE STATE OF ILLINOIS

THE STATE OF ILLINOIS,)
COUNTY OF JEFFERSON,)
ss. I, the undersigned,)
a Notary Public in and for)
the State of Illinois, do hereby)
certify that the foregoing)
instrument is a true and)
correct copy of the original)
instrument filed for record)
in my office this 1st day of)
January, 1934.

Witness my hand and the seal of my office this 1st day of January, 1934.

ss. Notary Public in and for the State of Illinois.

Notary Public in and for the State of Illinois, do hereby certify that the foregoing instrument is a true and correct copy of the original instrument filed for record in my office this 1st day of January, 1934.

ss. Notary Public in and for the State of Illinois, do hereby certify that the foregoing instrument is a true and correct copy of the original instrument filed for record in my office this 1st day of January, 1934.

ss. Notary Public in and for the State of Illinois, do hereby certify that the foregoing instrument is a true and correct copy of the original instrument filed for record in my office this 1st day of January, 1934.

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ss. Notary Public in and for the State of Illinois, do hereby certify that the foregoing instrument is a true and correct copy of the original instrument filed for record in my office this 1st day of January, 1934.

ss. Notary Public in and for the State of Illinois.

It is urged for reversal that the court erred in denying a motion of respondent to dismiss the petition; in denying a motion to strike out all the evidence pertaining to the physical condition of the deceased; in over-ruling respondent's motion for a new trial; in finding that a certain writing made on May 28, 1926, by the deceased did not transfer title to these securities to the respondent; and through the execution of said writing and other facts appearing did not show a good and complete gift inter vivos of these securities, and in refusing to find that the securities were not part of the estate of the deceased.

There is practically no dispute as to the evidence. At his death deceased was 80 years of age. At the time of the hearing the widow was 71 years of age and had been married to the deceased 40 years prior to that time. The deceased had four children by a prior marriage. For a time deceased and his wife lived on a farm, she keeping house and caring for the children; she worked by the day, washing. Out of the money saved from earnings they bought a lot, title to which was taken in her name and upon which was built the home in which they lived until the time of his death. The house was built out of her earnings. She washed, and he desiring to help got a horse and wagon and gathered up the clothes which she washed; she says, "He did the plain work, and I did the fancy work." The husband helped with the washing and ironing which was done at home in the basement for about 14 or 15 years; he collected the money and that continued until about 10 years before he died; during this time he had no other occupation of any kind; his health was poor about 10 years prior to his death. He went to New York for about three months, where he was in a hospital; from that time he never did any work but lived with his wife who had entered into a partnership with her sister in the business of washing for a living; from the money obtained in this way the

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There is something in this

At his death he was 70 years of age. He was a native of the
Holland. The other two 17 years of age and had been married to the
deceased 14 years prior to their death. The deceased had two
children by a prior marriage. One a fine educated and able wife
lived on a farm, she received money and acted for the family;
she married by the day, was a good housewife. One of the sons lived in
Cincinnati and worked a job, while the other was taken in her time
and now when we call the name is often that lived until the
time of his death. The house was built out of her savings. She
worked, and he continued to help her a house and when she returned
up the stairs and she worked; she was a good wife and a good
and I tell you that. The husband lived with the woman and
lived with her until he was in the hospital for about 10 or 12
years; he worked the money and that business until about 10
years before he died; during that time he had his first experience of
any kind; his death was about 17 years after he was born.
He was in New York for about 17 years before he was in a hospital;
he lived with his mother and his wife lived with his wife
and had children and a partnership with her sister in the business
of running for a living; from his money he was in the

house was kept, bills paid - some of the husband's doctor bills, and the taxes.

As the children grew older they left home, one by one. The eldest daughter went to work in a private home when seventeen years of age; she did not contribute to the Evanston home; she went to St. Louis where she died. The other daughter stayed at home and married when about twenty; she contributed nothing to the upkeep of the home. John, one of the boys, died at the age of about 30; he contributed nothing to the upkeep of the home. The respondent, Charles, left home at about seventeen or eighteen years of age while the family was still on the farm, and went to learn a trade; he went home once in awhile, but contributed nothing to the upkeep of the home; he married at the age of twenty-two or twenty-three; his father attended the wedding but the stepmother did not. After his marriage he went to Kenosha, Wisconsin; afterwards he went back to Evanston and then returned to Kenosha to live; he afterwards went back to Evanston, but the stepmother never visited him, although his father did occasionally, and Charles went to his father's home maybe once in two or three years; once in awhile he would go and see them and bring his family and stay a half hour or an hour; he had a family of two boys and three girls who sometimes went to his father's home.

In May, 1926, deceased became dangerously ill with high blood pressure, sinuses in his face and a trouble which, as it later developed, was cancer of the bowels. At that time respondent went to his father's home and asked if he could make a garden and was told he might. At this time the deceased was in the care of a physician, who testified. The physician visited the deceased professionally on May 21st and after that time attended him daily.

The deceased was confined to his bed and was informed by the physician that his symptoms indicated something of a serious nature. The physician says that deceased was weak physically and complained of pain on all occasions, complained of pain in his face, and that prior to this time deceased had been treated for tri-facial neuralgia which affected the left side of his face and indirectly the organs of speech. On his physician's advice he went to the St. Francis hospital in Evanston; he was taken there by his son Charles, the respondent, at about ten or eleven o'clock in the forenoon. His wife says she saw the key to his safety deposit box on the dresser and that he put it in his pocket; he underwent an examination at the hospital; Charles brought him home the next day where he remained until his death. The immediate cause of his death was a stroke of apoplexy which occurred just prior to that time.

On May 28th the deceased signed a writing upon the stationery of the hospital, as follows:

"St. Francis Hospital,
Evanston, Ill.
May 28th, 1926.

Mr. Chas. Steven, Pres.
City National Bank,
Dear Sir--

Kindly give Chas. A. Rohrer the contents of my safety deposit box with the exception of abstract and the deed of property and insurance policy.

Respectfully,
(Signed) M. L. Rohrer
5/28/26
E. H."

On the following day the respondent gave to the bank a receipt which states that he received the securities removed from the Safe Deposit Box, No. 574, of M. L. Rohrer, as per his order on file, dated May 28, 1926. The receipt is signed by the respondent and appears to be witnessed by Pearl D. Albright and E. Hunteinger.

The defendant made a motion to dismiss the petition,

which was denied, and he urges ^{here} that the court was without jurisdiction, citing Moore v. Brandenburg, 248 Ill. 240, and Dinsmore v. Bressler, 164 Ill. 211. Since these cases were decided, section 82 of chapter 3 has been revised with the result that all doubt as to the jurisdiction in a case of this kind is removed. Brown v. Mammoth, 247 Ill. App. 358.

The respondent argues the case upon the theory that the judgment of the court was based upon a finding of undue influence or fraud, and it is urged that the evidence does not sustain such a finding. We do not understand that any question of fraud or undue influence is necessarily involved in the case.

It was stipulated by the parties that the bonds and securities were obtained from the safety deposit box of the deceased on May 29, 1926, and that these bonds and securities were the property of the deceased and purchased by him and were in his possession until May 28, 1926. The case was tried upon respondent's theory that these bonds and securities belonged to him by reason of a gift inter vivos from the deceased, his father, on May 28, 1926. The securities were in his possession, but the mere possession of property in a proceeding of this kind is not sufficient to establish a valid gift. As was said in Merchants' Loan & Trust Co. v. Egan, 222 Ill. 497:

"We think where the title to property is claimed as a gift, the burden of proof is undoubtedly on the one claiming the gift."

Or as was said by the Supreme court in the later case of Bethwell v. Taylor, 303 Ill. 230:

"Mere possession by one claiming property as a gift, after death of the owner, is universally, we believe, held insufficient to prove a valid gift. *** The burden is on the donee to prove the gift by evidence not equivocal or uncertain."

The controlling question before the court therefore was whether the evidence was sufficient to establish such a gift

to the respondent. The controlling question before this court is whether that finding of the trial court (which is entitled to the same weight as the verdict of a jury) is clearly and manifestly wrong.

It is true, as respondent contends, that it is not disputed that the deceased signed the order dated May 28th; that this order was typewritten on the stationery of the St. Francis hospital, where he went on that date to be treated, and it may fairly be inferred from the evidence that the deceased delivered to respondent the key to the box. We do not, however, find any proof that the deceased dictated the order of May 28th, and these facts are not, in our opinion, sufficient to establish a gift, which, as we have already seen, it was necessary for the respondent to prove. As was pointed out in the leading case of Telford v. Fatten, 144 Ill. 611, (a case which has been consistently followed by the courts of this state) the essentials of a gift inter vivos are: (1) that it must be absolute and irrevocable; (2) that the giver must part with all present and future dominion over the property given; (3) that the gift shall go into effect at once and not at a future time; (4) that there be a delivery of the thing given to the donee, and (5) that the delivery must be made with the intention to vest the title of the thing given in the donee.

We hold that this record is entirely devoid of proof from which it could be reasonably found that these essentials of a gift are present. The acts performed are just as consistent with the theory that the deceased did not intend any one of these essentials as that such intention was present, and the trial court therefore could not have properly found that respondent sustained the burden of proof which was cast upon him. Such loss can this

court say that the finding of the trial court is clearly and manifestly against the weight of the evidence. If it was the intention of the deceased to convey title, why did not the writing express such an intention? The respondent calls our attention to Rosengren v. Mfr's National Bank, 220 Ill. App. 618, and urges that case as applicable here. We have examined the opinion carefully, but the facts there stated are not at all similar to those which appear here, since in that case there were letters by the deceased showing his intention to make a gift.

We find no reversible error in the record and the judgment is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and Labarely, J., concur.

32809

JOHANNA SMITH,
Defendant in Error.

vs.

HIBERNIAN LIFE INSURANCE
ASSOCIATION, a Corporation,
Plaintiff in Error.

699/a
ERROR TO MUNICIPAL COURT
OF CHICAGO.

250 I.A. 643

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff, Hibernian Life Insurance Association, a corporation, sued out this writ of error to review a record in the trial court wherein a judgment in the sum of \$800 was entered against defendant upon the finding of the court. The defendant is a fraternal insurance corporation and plaintiff sued as the beneficiary in a policy issued on January 2, 1920, upon the life of her brother, Maurice Keane, who died December 1, 1923.

The defenses set up in the pleadings were (1) that Keane failed and neglected to pay his assessment and per capita tax for May, 1923, and was suspended from membership on that account, in accordance with the constitution and by-laws of the order; that his policy thereby became null and void; (2) that the suit was not begun within one year after the death of Keane as required under section 4 of article 6 of the by-laws of the order; and therefore could not be maintained.

As to both of these defenses the plaintiff contended and the court apparently found they were waived by the defendant society.

There is little if any dispute as to the facts. The deceased was a member of subordinate lodge Division No. 23 of the order, of which Martin O'Brien was secretary and John Hyland treasurer. Mrs. Mary McWhorter was president and Mrs. Mary A. Sullivan secretary of defendant corporation. Keane first took out a policy in 1906, which

THE UNITED STATES OF AMERICA

NEW YORK

8501.A.048

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THE UNITED STATES OF AMERICA

The following information was received from the New York Office of the Federal Bureau of Investigation, dated January 10, 1950, and is being furnished to you for your information. The information was obtained from a confidential source who has provided reliable information in the past. The source has advised that the following information was obtained from a confidential source who has provided reliable information in the past. The source has advised that the following information was obtained from a confidential source who has provided reliable information in the past.

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As a result of the investigation, the following information was obtained from a confidential source who has provided reliable information in the past. The source has advised that the following information was obtained from a confidential source who has provided reliable information in the past. The source has advised that the following information was obtained from a confidential source who has provided reliable information in the past. The source has advised that the following information was obtained from a confidential source who has provided reliable information in the past. The source has advised that the following information was obtained from a confidential source who has provided reliable information in the past.

was exchanged in 1920 for the policy upon which suit is brought. The secretary and treasurer of the local division were authorized to collect dues and to receipt therefor. Section 2 of article 5 of the constitution and by-laws of the order provided in substance that any member who failed to pay in advance the regular monthly or special assessments or monthly per capita tax for any month on or before the first day of the month, should stand suspended and his benefit contract become null and void.

The dues of the deceased were 70 cents a month and in April, 1923, he failed to pay the same. O'Brien, the secretary, testifies that either in May or June he handed in the deceased's name and others as delinquent to the treasurer, but he says he didn't know that deceased was suspended; he says, "I was asked for delinquent members and just gave, as is customary, let them go for a month at a time; at the time they may not have money convenient, but later on they would pay back dues." Hyland, the treasurer, says that he received this list and sent it to Mrs. McWhorter for suspension. He says that after members were suspended it was not customary to advance dues and assessments for them.

According to the rules of the society, a suspended member could be reinstated within 30 days by signing up again; after 60 days a medical examination was required.

The records of the defendant indicate that Leane was suspended in May and never reinstated. July 27th the April dues and assessments were paid to O'Brien. The dues for May and June were also paid to him on September 13th and those for September, October, November and December were paid to him November 23th. All these payments were made by the plaintiff. O'Brien says that he turned all these payments over to the treasurer, Hyland.

O'Brien says that he received these payments, not knowing of any claim that Keane had been suspended, and Hyland testifies that the manner of transacting this business was such that he did not know whose money he in fact received from O'Brien; he says, "I don't know whether on November 28th or about that time, I got four months' dues from Mr. O'Brien for this deceased member."

There is no proof in the record that any notice of the suspension or the proposed forfeiture of the benefit policy was ever given to the insured. The uncontradicted testimony also, we think, tends to show that the provision of the by-laws for automatic suspension upon non-payment had not been theretofore strictly enforced.

However that may be, assuming a suspension and forfeiture, we think it must be held that the same were waived by the acceptance of subsequent payments of dues. The law does not favor forfeiture. The insured here paid his dues for about 17 years. There is no evidence from which it could be found that these subsequent payments were made in bad faith. The health of the deceased was not impaired, so far as the evidence tends to show, at the time of the payment of these subsequent dues. Indeed, the proof tends to show that he lost his life by violence. The defendant made the local society its agent and is bound by the action of its officers in accepting these dues paid in behalf of the insured.

Defendant seeks to distinguish Love v. Modern Woodmen, 259 Ill. 107, in that the by-laws there considered did not provide for automatic suspension for non-payment, and that the dues in that case were paid over by the subordinate to the principal lodge. These facts are not controlling upon this record. The waiver, of course, assumes a forfeiture. There is nothing in this record which tends to show that the insured was obligated to see that

dues paid to the local lodge were remitted to the superior lodge. Defendant is bound, not only by the actual authority but the apparent authority conferred by it upon the inferior body. This is elementary and it is unnecessary to review the cases which have been recently collected in an opinion by the Supreme court in Baxter v. Metropolitan Life Ins. Co., 318 Ill. 389.

It is next contended that plaintiff cannot recover because the suit was not started in apt time. Section 4 of article 6 of the by-laws provides that suit must be instituted within one year from the date of the member's death. The suit was not instituted within that time.

This condition was for the benefit of the insurance company, and such a defense is not favored and may be easily waived. Slight evidence is sufficient to sustain such a waiver. Covenant Mutual Life Ins. Co. v. Baughman, 73 Ill. App. 544.

In Ill. Live Stock Ins. Co. v. Baker, 153 Ill. 240, it is said: "Hopes of payment held out to insured by the company as an inducement not to sue, is a waiver of the limitation clause."

There is evidence in this record from which the court could have properly found that such hopes were held out to the plaintiff in this suit. Plaintiff testified that she was assured that everything would be all right and that she relied on these representations. The court must have found that there was a waiver, and we cannot say that the finding is clearly and manifestly wrong:

On September 16, 1927, (the record shows) this suit was dismissed for want of prosecution. On January 23, 1928, several months thereafter, the order dismissing the suit was vacated and set aside. It is now argued by the defendant that this order was erroneous, the court being without jurisdiction to

these bills to the local bodies were limited to the respective judges.
 Estimated in pounds, not only by the actual receipts but the ap-
 propriated receipts covered by it from the judicial body. This is
 elementary and it is unnecessary to review the cases which have
 been recently referred to be decided by the Supreme Court in
Justice v. Metropolitan Police Board, 111, 112, 113.

It is very important that judicial bodies should be
 deemed the only one and wished to be so, because it is of course
 one of the by-laws of the law that must be established within the
 year from the date of the receipt of the bill. The bill was not in-
 referred within that time.

This condition was not the result of the law
 itself, but each of them is not limited but only in reality
 referred. When referred to judicial bodies is within a certain
limit of time, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

It is also of course not to be limited by the law
 as to the amount but to be, is a matter of the judicial body.
 There is evidence in this regard from which the court

will have evidence from which it can be said that it is
 sufficient in this case. The judicial body will have evidence
 that the evidence is not sufficient to be said to be
 insufficient. The court will have evidence that there was a
 failure, and as stated by the court in the case of the

court will have evidence from which it can be said that it is
 sufficient in this case. The judicial body will have evidence
 that the evidence is not sufficient to be said to be
 insufficient. The court will have evidence that there was a
 failure, and as stated by the court in the case of the

enter it. There is nothing in the record from which we can ascertain the grounds upon which the court acted. No bill of exceptions was preserved in connection with this order. In the absence of a bill of exceptions or its equivalent, we will not presume that the court acted without the disclosure of facts which would confer jurisdiction.

For the reasons indicated the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

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1986

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32852

R. B. HUGHES for the use of
Harry Schamer,
Appellee,

vs.

JAHN & OLLIVER ENGRAVING COMPANY,
a Corporation, Garnishee,
Appellant.

69 Pa
250 I.A. 644
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The appellant, who was garnishee in the trial court, seeks to reverse an order denying a motion made on February 15, 1928, to vacate and set aside a final judgment for \$196.50, entered against it on December 13, 1927. The motion was supported by a petition filed more than thirty days after the entry of the judgment, and the proceeding was therefore necessarily under section 21 of the Municipal Court act. (Canill's Ill. Rev. Stat., chap. 37, sec. 4-9.)

This section in substance provides that a judgment cannot be vacated, set aside or modified after thirty days from its entry, except upon appeal or writ of error, or by bill in equity or by petition to the municipal court setting forth such grounds as would be sufficient to cause the same to be vacated, set aside or modified by bill in equity.

The petition filed in support of the motion avers the entry of the judgment on December 13, 1927; that immediately upon receipt of the garnishment summons petitioner communicated with the judgment creditor and notified him that there was due and owing to the judgment debtor the sum of \$40; that the judgment creditor then informed petitioner that if it would pay him this sum of \$40 no further proceedings would be commenced or pursued against the petitioner; that thereupon on December 3, 1927, petitioner as garnishee sent a check for the sum of \$40 payable to the order of

Handwritten signature/initials

250 L.A. 6-44
U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C.

TO: DIRECTOR, FBI
FROM: SAC, NEW YORK
SUBJECT: [Illegible]

Re New York letter to Bureau dated 1/15/54.
The enclosed, one was furnished to the local office.
Reference is made to letter to Bureau dated 1/15/54.
In view of the fact that a copy of the letter to Bureau dated 1/15/54 is being furnished to the local office, it is suggested that the letter to Bureau dated 1/15/54 be deleted from the file.
The enclosed is being furnished to the local office.
Very truly yours,
[Illegible]
Special Agent in Charge

the judgment creditor with the following notation thereon:

"In full payment for salary due R. D. Hughes from John Ollier Engraving Company to date":

that the said \$40 represented all that was due and owing from the petitioner to the judgment debtor and that there were no other effects, choses in action or property of any kind or description due and owing from it to the judgment debtor; that the check was received on December 6, 1927, and cashed by the judgment debtor with full knowledge that the same represented all that was due and owing from the garnishee to the judgment debtor; that the judgment creditor, contrary to his representations, nevertheless obtained a final judgment against petitioner on December 13, 1927, for the full amount of the judgment, namely, \$296.50 and costs, and thereafter the judgment creditor instituted a further proceeding for the purpose of enforcing his judgment against the petitioner; that the first knowledge petitioner received that a final judgment had been entered against it was on or about February 3, 1928.

The record shows that the petition came on before the court and that the counsel for the judgment creditor made a motion to strike the same for insufficiency, whereupon the court said:

"Counsel demurs to your petition. I don't think you have to make a record. I do not care to hear any testimony if he has not filed a counter-motion. For the purpose of this motion, let the record show that petition has been made here to vacate this judgment, and, in support of the motion a sworn petition has been filed in this case, properly filed with the clerk of the court, and the court hears and entertains this motion on the petition, and for the purpose of deciding the motion, assumes and believes that all the allegations in the petition are taken to be true. Counsel for the judgment creditor says that even though they are true, they do not constitute legal reasons for vacating this judgment. The court concurs with the views adopted by counsel for the judgment creditor in this case."

It is apparent, therefore, that in effect the court sustained the motion to strike the petition.

That the municipal court under section 21 or a court of equity under its general jurisdiction has power, even after the

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and that the Commission has not yet received any information from the Commission.

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The present study was the first to examine the effects of a 12-week training program on the physical and psychological health of older adults with a history of falls.

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expiration of a term of court or of other time limited to modify a final judgment order or decree, is well settled by the authorities. Doyle v. Fallows, 207 Ill. App. 5; Gottschall v. Kimbark State Bank, 220 Ill. App. 473; Imrie v. Bear, 230 Ill. App. 155; Izzi v. Jalongo, 248 Ill. App. 90.

The judgment creditor contends, however, that equity will not grant relief from the consequences of a petitioner's own negligence, and in support of this proposition cites some of the cases to which we have already referred and Bardonski v. Bardonski, 144 Ill. 284; Kretschmar v. Ruprecht, 230 Ill. 492; Ragner v. Haover, 318 Ill. 169. Such of these cases as are in point sustain the general proposition for which the judgment creditor contends, but no one of these cases, insofar as our examination discloses, holds that this rule is applicable to a case where representations and promises made by the party plaintiff or complainant to a suit is the cause of the neglect or failure of a defendant to present his defense. Such a plaintiff or complainant in our opinion is estopped to interpose such a defense upon the clear principle that a party cannot rely upon his own wrong for his own benefit. Such a situation is presented here by this petition. If the allegations of the petition are true (as we must assume) then the garnishee is placed in a position where he has already paid to the judgment creditor the entire amount which he owes the judgment debtor and nevertheless finds himself held for the full amount of the original indebtedness and costs.

We think the facts set up in the petition disclose not so much a case of negligence as of confidence misplaced. The judgment is therefore reversed and the cause remanded with directions to enter a ruling upon the judgment creditor to answer the petition.

REVERSED AND REMANDED.

O'Connor, P. J., and McGurely, J., concur.

32874

THERESA HUNTER,
Appellee,
vs.

UNDERWRITERS MUTUAL LIFE
INSURANCE COMPANY, a Corporation,
Appellant.

6973a
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

250 I.A. 644²

MR. JUSTICE MCGINTY DELIVERED THE OPINION OF THE COURT.

This case was before us on a former appeal (see general number 31818, not yet reported) and a judgment in favor of plaintiff was reversed for the reason that the verdict of the jury was, as here, found to be clearly contrary to the evidence.

The action was brought on a life insurance policy dated June 27, 1924. The assured died December 4, 1924. The cause of death was organic heart disease, for which the evidence shows beyond any reasonable doubt the assured had been treated by a physician during the months of February and March immediately prior to his application for the policy in which he stated that he had never suffered from this or certain other diseases nor had he been treated for them. The evidence discloses, not only that the deceased was a sufferer from this disease but that he collected health insurance on account of incapacity caused by it.

The evidence is not materially different from that given upon the former hearing, with the exception of some testimony given by the wife tending to contradict the statements of the physician who attended the deceased. Her evidence was not produced on the former trial, and this record discloses no attempt to excuse its non-production at that time. In this state of the record the denial has little, if any, weight.

The case is without merit, and for that reason the judgment will be again reversed and the cause remanded.

REVERSED AND REMANDED.

O'Conner, P.J., and McGuire, J., concur.

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UNITED STATES DEPARTMENT OF JUSTICE

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32587

6996 250 I.A. 344³

WILLIAM C. DANNENBERG,
Defendant in Error.

v.

IR. ALLAN HARVEY FERGUSON,
Plaintiff in Error.

} ERROR TO MUNICIPAL COURT
}
}
}
}
} OF CHICAGO.

MR. PRESIDING JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks to reverse a judgment for \$1921.10, rendered against him on January 21, 1926, in a first class action in contract tried before a jury. The action was commenced on March 31, 1924. By the jury's verdict plaintiff was awarded the full amount of his claim. He was engaged in business as a detective agent or investigator.

In the amended statement of claim plaintiff alleged that at defendant's request he "made certain investigations, expended moneys incidental thereto and paid investigators for services rendered in the matter," which defendant promised to pay for, but did not do so. attached to the statement is an itemized account of the services claimed to have been rendered by different assistant detectives or investigators, employees of plaintiff, at the rate of \$10 per day, from time to time from March 29, 1918, to and including January 27, 1921, aggregating \$1320; also an itemized account of "incidental" expenses incurred during the same period aggregating \$101.10.

In the affidavit of merits defendant denied that plaintiff, through his assistants, had rendered the services, or had

expended the moneys, as claimed. He alleged that such services as plaintiff did render were not rendered at his (defendant's) request, and that the charges, as set forth in the account, were unreasonable and excessive.

On the trial plaintiff was his principal witness and defendant was the sole witness in his behalf. Plaintiff also called as witnesses three of his former assistants who, with six or seven other assistants, as he claimed, had rendered the services sued for. He introduced in evidence certain letters and a telegram passing between him and defendant in February and March, 1920, when, and for more than a year prior thereto, the latter was engaged as a surgeon in the United States Army, in a hospital at Fort Leavenworth, Kansas. Plaintiff also was allowed to introduce in evidence, over objection, certain sheets of a loose-leaf ledger kept by him in his business, showing a running account against "Judge McKenzie Cleland," in the matter of "Ferguson v. Ferguson," for services rendered and disbursements made from March 29, 1918, to and including January 27, 1921. The account is substantially the same as the one attached to plaintiff's statement of claim above mentioned, except that the name of each assistant who rendered the claimed service is mentioned. No credit items are shown in the account.

It appears from the testimony of the witnesses in substance that in March, 1918, there was a litigation pending in one of the courts of Cook county between defendant and his wife, - she having filed a bill for separate maintenance against him and he having filed a cross-bill for divorce against her; that ex-judge McKenzie Cleland had been retained to represent defendant in the litigation as solicitor and legal adviser and was acting as such; that Cleland, with

expended the money, as claimed. He alleged that such services as
financially did not cost him and consisted of his (defendant's) property,
and that the charges, as set forth in the account, were unreasonable
and excessive.

On the trial plaintiff was the principal witness and
defendant was the only witness in his behalf. Plaintiff also called
an witness of his former residence who, after six or seven
other witnesses, as he claimed, had rendered the account and for
he introduced in evidence certain letters and a telephone record
between him and defendant in Chicago and Boston, Mass., and for
more than a year prior thereto. The latter was supposed to be a witness
in the United States, in a number of their conversations. Plaintiff
also called a witness in evidence in evidence, who testified
certain sheets of a letter-book signed by him in his business,
showing a number of accounts against "John William Plaintiff," in the
matter of "Plaintiff v. Defendant," the various payments and disburse-
ments made from March 20, 1911, to and including January 27, 1912.
The account is substantially the same as the one introduced in plain-
tiff's statement of claim above mentioned, except that the name of
each defendant was changed to Plaintiff and the name of each
creditor was changed to the account.

It appears from the testimony of the witnesses in evidence
that in March, 1911, there was a telephone call from one of the
witnesses to their family between defendant and his wife, - the latter
telling a story for several minutes and that she was making time
a cross-call for a number of days. Plaintiff testified
had been refused to represent defendant in the litigation as
counsel and legal adviser and was acting as such that Plaintiff, with

defendant's knowledge, employed plaintiff to secure, if possible, evidence in support of the allegations of defendant's cross-bill; that in March, 1913, and from time to time thereafter, certain of plaintiff's assistants did certain "shadowing" or detective work, reporting the results thereof to plaintiff, who, in turn, made reports to Cleland and not to defendant; that, as the services were performed, plaintiff from time to time rendered bills therefor to Cleland; that shortly before the commencement of the present action in March, 1924, Cleland died; that prior to Cleland's death plaintiff never rendered any bill for services to defendant; and that plaintiff's first demand on him to pay for said claimed services and disbursements was made after Cleland's death and shortly before the commencement of the present action.

Several points are urged as grounds for a reversal of the judgment, but we shall consider only one, viz., that the court erred in admitting in evidence said loose-leaf ledger sheets, purporting to show the account of the claimed indebtedness sued for. After examining said sheets and reviewing the evidence we think that the point is well taken. It is apparent that the jury's verdict is based entirely upon the figures as shown on the sheets. Neither plaintiff nor any of his witnesses gave satisfactory testimony as to the correctness of any item thereon. Furthermore, the entries are not original entries. Plaintiff's testimony was to the effect that, when one of his assistants worked on any particular job, a written report of the work done and the time expended was given him by the assistant on a piece of paper, called a "report slip;" that thereafter either he or his secretary transferred the items as stated on the slip to a ledger sheet; that at the time of the transfer neither had knowledge as to

the correctness of the amount of time expended by the assistant, as stated by the assistant on the slip; and that at the end of each year all these report slips were destroyed. In Stettauer v. White, 98 Ill. 72, 77, it is said: "But at common law, where the clerk who made the entries had no knowledge of the correctness of the entries but made them as the items were furnished by another, it was essential that the party furnishing the items should testify to their correctness, or that satisfactory proof thereof (such as the transactions were reasonably susceptible of) from other sources should be produced." (See, also, House v. Beak, 141 Ill. 290, 298.) In the present case no satisfactory proof from other sources was offered. Nor was there an attempted compliance with section 3 of the "Evidence and Depositions Act." (Cahill's Stat. 1927, Chap. 51, p. 1246; see, also, Trainer v. German-American Ass'n, 204 Ill. 616, 621; Moore v. David J. Molloy Co., 222 Ill. App. 295, 298; Roder v. Pipe, 235 Ill. App. 89, 105.)

For the reasons indicated there should be another trial of the case and the judgment of the municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan and Barnes, JJ., concur.

the correctness of the amount of time expended by the assistant,
 as stated by the witness on the fifth and sixth of each
 year all these reports were destroyed. In Boyd v. Boyd,
 100 Ill. 2d, 77, 12 Ill. 2d, 12 Ill. 2d, 12 Ill. 2d, 12 Ill. 2d,
 where the witness had no knowledge of the correctness of the entries
 but made them as the same were furnished by another, it was held that
 that the party furnishing the items should be liable for their correct-
 ness, or that satisfactory proof thereof (such as the examination
 were reasonably accessible to) from other sources should be produced."
 (See also Boyd v. Boyd, 100 Ill. 2d, 77, 12 Ill. 2d, 12 Ill. 2d,
 no satisfactory proof from other sources was offered. See also Boyd
 an attempt was made to establish the correctness of the entries and deposits
 100 Ill. 2d, 77, 12 Ill. 2d, 12 Ill. 2d, 12 Ill. 2d, 12 Ill. 2d, 12 Ill. 2d,
 100 Ill. 2d, 77, 12 Ill. 2d, 12 Ill. 2d, 12 Ill. 2d, 12 Ill. 2d, 12 Ill. 2d,
 100 Ill. 2d, 77, 12 Ill. 2d, 12 Ill. 2d, 12 Ill. 2d, 12 Ill. 2d, 12 Ill. 2d,
 for the reasons indicated there should be another trial of
 the case and the judgment of the municipal court is reversed and the
 case remanded.

REVEREND THE PRESIDENT.

Section and Article, 11, Chapter.

32603

6997 250 I.A. 644⁹

WESTON-JOHNSON MANUFACTURING
COMPANY, a corporation,
Appellant,

v.

MORRIS GOLDBLATT and NATHAN
GOLDBLATT, copartners as
Goldblatt Bros. and F. W. PLANERT
& SONS, incorporated,
Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

On December 19, 1927, complainant filed in the Superior court a verified bill praying for a temporary injunction, enjoining the defendants, their agents, attorneys, etc., "from advertising for sale, or offering for sale, or representing for sale, or selling, tubular ice skates of complainant below the regular retail selling price of such skates in the sum of \$6.85, or of advertising the skates of complainant in juxtaposition with advertising made in regard to the tubular ice skates of F. W. Planert & Sons, incorporated, or of Planert skates, where the skates of complainant are advertised for sale at any price below that of said Planert & Sons, or at less than \$6.85 per pair, or from any further carrying out of the conspiracy complained of in the bill of complaint herein, or from further representing, either directly or indirectly, the skates of complainant to be of inferior character to those skates called Planert skates;" and that upon final hearing said injunction may be made perpetual, and that complainant may have such further relief as to equity belongs, etc.

On the same day, without notice, the injunction was issued

as prayed for, - complainant's bond in the sum of \$2,000 being approved and filed. On December 22nd, the defendants having appeared by their respective solicitors, the court, on the motion of the Goldblatts to dissolve the injunction on the face of the bill, entered an order dissolving the same, and that all defendants be allowed to file suggestion of damages. On December 23rd, complainant moved that the bill be dismissed and that it be allowed to appeal from that order or decree to this appellate court. The court granted the motions, dismissed the bill at complainant's costs, retained jurisdiction of the cause solely for the purpose of disposing of the suggestion of damages, and allowed the present appeal, which thereafter was perfected. This procedure is proper, where the only relief sought is an injunction, as in the present case. (Williams v. Chicago Exhibition Co., 188 Ill. 19, 26.) Although the final decree does not specifically dismiss the bill "for want of equity," the record sufficiently discloses that the temporary injunction was dissolved and the final decree entered because the court was of the opinion that there was no equity appearing upon the face of the bill.

The sole question for our determination is whether the facts, as alleged in the bill, warranted equitable relief by injunction as prayed for. Defendants' motion to dissolve operated as a demurrer to the bill and admitted the truth of the facts therein properly pleaded, as distinguished from conclusions or inferences of law. (Williams v. Chicago Exhibition Co., 188 Ill. 19, 26; Rose v. Clark, 225 id. 326, 330; Forster v. Brown Machinery Co., 266 id. 267, 295; Feston v. Swanson, 306 id. 518, 522.)

In the bill complainant alleges that it is, and has been for many years, an Illinois corporation, having its principal place of business in Chicago; that the Goldblatts are copartners in the business

as proper law - complainant's bond in the sum of \$2,500 being approved
and filed. On December 12th, the defendant having appeared by brief
responsive thereto, the court, on the motion of the defendant to
dismiss the information on the basis of the bill, entered an order
dismissing the same, and that all defendants be allowed to file
petition of appeal. On December 12th, complainant moved that the
bill be dismissed and that it be allowed to appeal from that order of
dismissal to this appellate court. The court granted the motion, dis-
missing the bill of complainant's motion, retained jurisdiction of the
cause solely for the purpose of disposing of the petition of appeal,
and allowed the present appeal, which thereafter was perfected. This
proceedure is proper, since the only relief sought is an injunction, as
in the present case. Illinois v. Chicago & North Western Ry. Co., 121 Ill. 2d
261. Although the final order does not specifically dismiss the bill
"for want of equity," the record sufficiently discloses that the
complaint is dismissed and dissolved and the final order entered pursuant
to the bill is of the nature that there was no equity appearing upon
the face of the bill.

The rule requiring the non-compliance is stated in Illinois v. Chicago & North Western Ry. Co., 121 Ill. 2d 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

of conducting a department store in Chicago, and were conducting such business when the acts hereinafter complained of were committed; that F. E. Planert & Sons, incorporated, was and is an Illinois corporation, having its principal place of business in Chicago; that complainant and Planert & Sons were and are competitors in the business of manufacturing and selling, in Illinois and other states, skates of the same general design, known as "tubular ice skates;" that Planert & Sons' skates have not been widely advertised and do not enjoy in the trade the wide reputation of complainant's, nor are they as generally known to the public; that the term "Johnson skates" has for many years designated the tubular skates made by complainant and no others; that one of its models has been and is known as "Flyers"; that for many years its skates have been widely advertised, and were and are of the finest type of workmanship and have commanded in the retail trade as large a price as any tubular skates, and it has built up a lucrative and valuable business in the manufacture and sale of the same; that it has sold and is selling its skates in Chicago through jobbers and wholesalers, but, by its adopted method, has not sold skates in Chicago directly to the retail trade, excepting large dealers whose purchases are equal to those of a jobber; and has consistently maintained the wholesale selling price of its "Flyers" model to distributors and jobbers at \$4.50 per pair, and to the retail trade of from \$6.85 to \$7.50 per pair; and that it has constantly striven to prevent any price cutting by its distributors or by retailers.

Complainant further alleges that the type or model of tubular skates made and sold by Planert & Sons has been and is known as "Winners"; that these skates have a general resemblance to complainant's, but that they have been and are sold at a lower price to the retail trade; that

of course, the same is true of the other side of the coin. The fact that the same business is being done in the same way, and that the same results are being achieved, is a strong indication that the business is being done in the same way. The fact that the same business is being done in the same way, and that the same results are being achieved, is a strong indication that the business is being done in the same way. The fact that the same business is being done in the same way, and that the same results are being achieved, is a strong indication that the business is being done in the same way.

the Goldblatts as a part of their retail business have been and are selling to their customers tubular skates, acquired in the ordinary business for sale; that the Goldblatts,

"being incensed against your orator, on account of the fact that it as a manufacturer disposed of its product to jobbers and large dealers, and on account of the fact that your orator as a manufacturer did not think it good business policy to sell directly to retailers and had refused to sell its tubular skates directly to said firm of Goldblatt Bros. as a retailer, and had so informed said firm, maliciously and unlawfully conspired with said Planert & Sons to injure the business and good will of your orator, and said Planert & Sons maliciously and unlawfully conspired with said firm of Goldblatt Bros. to carry on an unfair competition with your orator, and to market its skates instead of said Johnson skates asked for by customers, and agreed * * to make and publish the advertisements hereinafter set forth and other advertising of that character, and to cause said Goldblatt firm to advertise for sale and sell the tubular skates of your orator at a price less than cost, and to keep on hand a few of said Johnson skates (not enough in quantity to justify the advertising thereof) and, when exhausted, to offer said Planert skates to customers of said Johnson skates, and, by means of said advertisements and such prices, to represent the tubular skates of your orator to be of inferior quality as compared with the tubular skates of said Planert & Sons, and to cause the various retailers dealing in tubular skates to decline to deal in and to carry the tubular skates of your orator, and to cause it to be understood in the trade that your orator was cutting the price of its skates through sales by said Goldblatts, and to destroy the business and sales of tubular skates by your orator, and to cause retail dealers to cancel orders for the tubular skates of your orator; and did further agree to divide between said Planert & Sons and said Goldblatt firm the cost of said advertising; and that, in pursuance of said unlawful conspiracy * *, did on December 4, 1927, publish and cause to be published at their joint cost or at the cost of said Planert & Sons in the Chicago Herald and Examiner, a Chicago newspaper, having a wide circulation, the following advertisement:"

A copy of the advertising sheet of the newspaper is set out in the bill. At the top of the advertisement is the name in large letters of "Goldblatt Bros. Dept. Store" and the location of the store at "1609-35 W. Chicago Ave., near Ashland." Then appears a heading in large letters "Genuine Planert Skates" in the center of the sheet. Underneath this heading, and to the left, is a cut of a high laced shoe, attached underneath to a tubular skate, and the words, "The World's Best Skate," and also a figure of a boy skating and a dog

running along beside him, and the words, "I'm as fast as you are now, Speed." Underneath said heading, but to the right, are the words, in heavy black type, "Planert's All Steel, Full Tubular Ice Skates." Then follow the sentences, in small type: "'Winner' Model, for racing, hockey, figure and pleasure skating. Electrically welded. No open seams. Shoes of selected leather. Nationally advertised and guaranteed by the manufacturer. On sale, a pair _ _ _." Still further to the right are the figures, in very large black type, "\$6.95." Underneath said sentences are the words: "Free; a pair of pure all-wool skating hose with every pair." Immediately to the left of the figure of the boy and dog, and separated therefrom by a broad line, is another cut of a high laced shoe, attached underneath to a tubular skate. Above this cut are the words "Nester Johnson Skates." The word "skates" is of larger and blacker type than the words "Nester Johnson." Below this cut are the sentences, in very small type: "The well-known Nester Johnson skates, Hockey or Racers for women or men. Famous Flyer brand. All sizes, a pair - - -." Immediately to the right of the sentences are the figures, in large black type, "\$4.98."

Complainant further alleges that by reason of said advertisement defendants "did cause it to be understood that your orator was selling its skates to a particular dealer at a large discount, and was enabling said Goldblatt firm to sell its skates at a lower price than they could be purchased by any other dealer and sold at less than cost in the retail trade, and did impliedly represent said tubular skates of your orator to be, to the public understanding, inferior to said Planert skates, and the public did understand that your orator's skates were inferior to said Planert skates."

Complainant further alleges that thereupon, and in pursuance

of said conspiracy, the Goldblatt firm, having on hand a few pairs of said Johnson skates, sold them at the price advertised, and thereafter "offered for sale to customers, asking for Johnson skates, Planert skates at the same cut price, which said price of \$4.95 was below the price at which any retailer could acquire Johnson skates;" that thereafter the Goldblatt firm, having thus sacrificed its small number of complainant's skates, attempted to obtain additional skates manufactured by complainant to further carry on said conspiracy, but was unable to obtain the same from complainant "at a price below \$5.50 per pair;" and that thereupon the Goldblatt firm, "having obtained about 75 pairs of your orator's skates at said price of \$5.50 per pair, and being thus equipped to further carry on the said conspiracy, did, on December 9, 1927, publish in the Chicago Daily News, a newspaper having a wide circulation in Chicago, the following advertisement:" (copy of the advertising sheet of the newspaper is set out in the bill.)

In the portion of the advertisement, relating to Nestor Johnson and Planert skates, the former are first mentioned as being for sale, including the "famous 'Flyer' brand," all sizes, "at the sensationally low price" of "5.48 a pair;" and lower down in the advertisement the "Genuine Planert Skates" are mentioned with equal prominence. The price is stated to be "\$6.95," for these "all steel, full tubular ice skates, 'Winner' model, for racing, hockey, figure and pleasure skating; shoes of solid leather; rigidly guaranteed," and it is further stated, "Free, a \$1.00 set of scabbard guards with every pair."

Complainant further alleges that the price of the Johnson skates as mentioned in the advertisement was below the cost price, and that the advertisement "was calculated to produce the same effect

as the preceding advertisement;" that thereafter the Goldblatt firm sold its few pairs of complainant's skates at the price of \$5.48 per pair, and "thereupon offered Planert skates to customers, asking for Johnson skates, at \$5.48 per pair;" and that on December 14, 1927, in furtherance of the conspiracy, advertised Johnson skates for sale at the price of \$5.44 per pair, in said Chicago Daily News. This third advertisement is set out in full in the bill. It is much the same as the second, except that the "sensationally low price" of Johnson skates is stated to be "\$5.44 per pair." The price of the Planert skates, with the "free" set of \$1.00 scabbard guards, is still stated to be "\$6.95 per pair." Complainant further alleges that the Goldblatt firm, on December 16, 1927, in pursuance of the conspiracy, caused to be published in the Chicago Daily News a fourth advertisement, (also set out in full in the bill.) In this advertisement, under the heading "Nestor Johnson Skates," are the words "Another Big Shipment Received for Tomorrow." And the skates are advertised for sale at the "sensationally low price, per pair, of \$5.39." Underneath, but not so prominently, are advertised for sale "Planert's," the "World's Best Ice Skates," at \$6.95 per pair, with a \$1 set of Scabbard Guards, free, with every pair.

Complainant further alleges that all of said acts and advertisements were done and published "solely for the malicious and unlawful purpose of injuring the business of your orator and the good name and value of its tubular skates, and not to advance any legitimate purpose of their own;" that the conspiracy, the publication and the acts of the Goldblatt firm and Planert Sons were done, not for the lawful and legitimate advancement of the business of the Goldblatt firm, "but solely for the willful and malicious

purpose of injuring the business of your orator, of bringing its tubular skates into disrepute, and of drawing away the customers for said tubular skates of your orator;" that, by said conspiracy and acts, "the business of your orator had been greatly injured and your orator has been exposed to damages which cannot be measured in money and are irreparable in their nature;" and that defendants' said acts "constitute a continuing wrong and injury irreparable in its nature for which no adequate remedy at law exists and which can be redressed solely by a court of equity."

Counsel for the respective parties have filed exhaustive briefs and the case has been orally argued before us. After examining the allegations of complainant's bill, and considering the briefs and arguments of opposing counsel, and reviewing many adjudicated cases, we have reached the conclusion that the bill states such facts as require, under the decided current of authority of the courts of this and other States and of the United States, that defendants plead to or answer the bill and that a hearing upon the merits be had. We think that the bill sufficiently discloses prima facie that defendants willfully and maliciously sought, and at the time of the filing of the bill still were seeking, to injure complainant in its trade and business, thereby causing it irreparable damage, and that defendants willfully and maliciously conspired together to that end, and, when the acts as alleged were committed in consummation of the conspiracy, had no legitimate purpose of their own to serve. (Doremus v. Hennessey, 176 Ill. 608; London, etc. Co. v. Horn, 206 id. 493; Purington v. Hinchliff, 219 id. 159; Carlson v. Carpenter Contractors' Assn., 305 id. 331; Dunshoe v. Standard Oil Co., 152 Iowa 618; Tuttle v. Buck, 107 Minn. 145; Passaic Print Works v. Ely & Walker Dry Goods Co., 105 Fed. Rep. 163, 167 - dissenting opinion; Wildee v. McKee, 111 Pa. St. 335; Carew v.

purpose of injuring the business of your sister, or obtaining the
 capital which she has invested, and of driving away the customers for
 said capital which of your sister, that, by said conspiracy and
 acts, the business of your sister had been greatly injured and your
 sister has been exposed to damage which cannot be measured in money
 and are irreparable in their nature; and that defendant's acts are
 "conspiratorial and malicious" and injury irreparable in its nature
 for which an adequate remedy at law exists and which can be obtained
 solely by a court of equity."

Secondly, for the responsive parties have this responsive
 parties and the case has been fully argued before me. After considering
 the allegations of complainant's bill, and considering the facts and
 arguments of respondent's answer, and reviewing the evidence, I find
 we have reached the conclusion that the bill states such facts as
 require, under the doctrine of equity of the equity of this
 and other States and of the United States, that respondent should be
 ordered to answer the bill and that a decree upon the merits be had. In doing
 that the bill sufficiently alleges facts which entitle complainant to relief
 which are not discredited by the answer, and at the time of the filing of the bill
 relief was needed, as before mentioned in its facts and business,
 thereby making it irreparable damage, and that defendant's conspiracy
 and maliciously conspired together to injure said complainant and to
 alleged acts revealed in consideration of the conspiracy, and to
 defendant's purpose of their own to injure. (Exhibit A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, AB, AC, AD, AE, AF, AG, AH, AI, AJ, AK, AL, AM, AN, AO, AP, AQ, AR, AS, AT, AU, AV, AW, AX, AY, AZ, BA, BB, BC, BD, BE, BF, BG, BH, BI, BJ, BK, BL, BM, BN, BO, BP, BQ, BR, BS, BT, BU, BV, BW, BX, BY, BZ, CA, CB, CC, CD, CE, CF, CG, CH, CI, CJ, CK, CL, CM, CN, CO, CP, CQ, CR, CS, CT, CU, CV, CW, CX, CY, CZ, DA, DB, DC, DD, DE, DF, DG, DH, DI, DJ, DK, DL, DM, DN, DO, DP, DQ, DR, DS, DT, DU, DV, DW, DX, DY, DZ, EA, EB, EC, ED, EE, EF, EG, EH, EI, EJ, EK, EL, EM, EN, EO, EP, EQ, ER, ES, ET, EU, EV, EW, EX, EY, EZ, FA, FB, FC, FD, FE, FF, FG, FH, FI, FJ, FK, FL, FM, FN, FO, FP, FQ, FR, FS, FT, FU, FV, FW, FX, FY, FZ, GA, GB, GC, GD, GE, GF, GG, GH, GI, GJ, GK, GL, GM, GN, GO, GP, GQ, GR, GS, GT, GU, GV, GW, GX, GY, GZ, HA, HB, HC, HD, HE, HF, HG, HH, HI, HJ, HK, HL, HM, HN, HO, HP, HQ, HR, HS, HT, HU, HV, HW, HX, HY, HZ, IA, IB, IC, ID, IE, IF, IG, IH, II, IJ, IK, IL, IM, IN, IO, IP, IQ, IR, IS, IT, IU, IV, IW, IX, IY, IZ, JA, JB, JC, JD, JE, JF, JG, JH, JI, JJ, JK, JL, JM, JN, JO, JP, JQ, JR, JS, JT, JU, JV, JW, JX, JY, JZ, KA, KB, KC, KD, KE, KF, KG, KH, KI, KJ, KK, KL, KM, KN, KO, KP, KQ, KR, KS, KT, KU, KV, KW, KX, KY, KZ, LA, LB, LC, LD, LE, LF, LG, LH, LI, LJ, LK, LL, LM, LN, LO, LP, LQ, LR, LS, LT, LU, LV, LW, LX, LY, LZ, MA, MB, MC, MD, ME, MF, MG, MH, MI, MJ, MK, ML, MM, MN, MO, MP, MQ, MR, MS, MT, MU, MV, MW, MX, MY, MZ, NA, NB, NC, ND, NE, NF, NG, NH, NI, NJ, NK, NL, NM, NN, NO, NP, NQ, NR, NS, NT, NU, NV, NW, NX, NY, NZ, OA, OB, OC, OD, OE, OF, OG, OH, OI, OJ, OK, OL, OM, ON, OO, OP, OQ, OR, OS, OT, OU, OV, OW, OX, OY, OZ, PA, PB, PC, PD, PE, PF, PG, PH, PI, PJ, PK, PL, PM, PN, PO, PP, PQ, PR, PS, PT, PU, PV, PW, PX, PY, PZ, QA, QB, QC, QD, QE, QF, QG, QH, QI, QJ, QK, QL, QM, QN, QO, QP, QQ, QR, QS, QT, QU, QV, QW, QX, QY, QZ, RA, RB, RC, RD, RE, RF, RG, RH, RI, RJ, RK, RL, RM, RN, RO, RP, RQ, RR, RS, RT, RU, RV, RW, RX, RY, RZ, SA, SB, SC, SD, SE, SF, SG, SH, SI, SJ, SK, SL, SM, SN, SO, SP, SQ, SR, SS, ST, SU, SV, SW, SX, SY, SZ, TA, TB, TC, TD, TE, TF, TG, TH, TI, TJ, TK, TL, TM, TN, TO, TP, TQ, TR, TS, TT, TU, TV, TW, TX, TY, TZ, UA, UB, UC, UD, UE, UF, UG, UH, UI, UJ, UK, UL, UM, UN, UO, UP, UQ, UR, US, UT, UU, UV, UW, UX, UY, UZ, VA, VB, VC, VD, VE, VF, VG, VH, VI, VJ, VK, VL, VM, VN, VO, VP, VQ, VR, VS, VT, VU, VV, VW, VX, VY, VZ, WA, WB, WC, WD, WE, WF, WG, WH, WI, WJ, WK, WL, WM, WN, WO, WP, WQ, WR, WS, WT, WU, WV, WW, WX, WY, WZ, XA, XB, XC, XD, XE, XF, XG, XH, XI, XJ, XK, XL, XM, XN, XO, XP, XQ, XR, XS, XT, XU, XV, XW, XX, XY, XZ, YA, YB, YC, YD, YE, YF, YG, YH, YI, YJ, YK, YL, YM, YN, YO, YP, YQ, YR, YS, YT, YU, YV, YW, YX, YY, YZ, ZA, ZB, ZC, ZD, ZE, ZF, ZG, ZH, ZI, ZJ, ZK, ZL, ZM, ZN, ZO, ZP, ZQ, ZR, ZS, ZT, ZU, ZV, ZW, ZX, ZY, ZZ).

Rutherford, 106 Mass. 1; Aikens v. Wisconsin, 195 U. S. 194, 203;
American Bank & Trust Co. v. Federal Reserve Bank, 256 U. S. 350, 357.)
And we think that the bill sufficiently discloses prima facie a case
of conspiracy on the part of defendants to unlawfully and maliciously
carry out a scheme of unfair competition, remediable by injunction.
(Boylston Coal Co. v. Hantenbush, 237 Ill. App. 550; Fisher v. Star Co.,
231 N. Y. 414; International News Service v. Associated Press, 248 U.S.
215.) In the case last cited the Court says: (p. 241): "It is said
that the elements of unfair competition are lacking because there is no
attempt by defendant to palm off its goods as those of the complainant,
characteristic of the most familiar, if not the most typical, cases of
unfair competition. * * But we cannot concede that the right to
equitable relief is confined to that class of cases." and there are
elements in the present case, as in said Associated Press case, of false
pretense and misrepresentation. The statement in the fourth advertise-
ment (as alleged in the bill), "Another big shipment received for
tomorrow," taken in connection with the other facts as alleged, is clearly
a misrepresentation, tending to greatly damage complainant with the
jobbers in Chicago and vicinity to whom it had been selling its tubular
skates, particularly in view of its adopted method of business, as
alleged, viz, not generally selling its skates directly to the retail trade.

The judgment appealed from, dismissing complainant's bill,
is reversed, and the cause is remanded to the Superior Court with
directions that the court enter a rule upon the defendants to plead to or
answer the bill, as they severally may be advised, and for a hearing upon
the merits.

REVERSED AND REMANDED WITH DIRECTIONS.

Seanlan and Barnes, JJ., concur.

Numbered, 100 pages, 11 x 17 cm, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2

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Information has been furnished to the Bureau of the following:

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1. 2003年10月10日，177例，100%；2004年10月10日，182例，100%。

1. 1988. *Journal of the American Statistical Association* 83: 111-122.

[illegible]

10. It should also be noted that no significant difference in the

11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847

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FRANK L. LESSCH,
Defendant in Error.

v.

A. L. NICHOLS,
Plaintiff in Error.

ERROR TO CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRISLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for personal injuries sustained by plaintiff in an automobile accident on the afternoon of November 8, 1924, in the intersection of Woodlawn Avenue and 58th Street, Chicago, there was a trial before a jury, resulting in a verdict in plaintiff's favor for \$3,000. It is sought by this writ of error to reverse the judgment entered upon the verdict against defendant on December 17, 1927.

On a former trial a jury returned a verdict in plaintiff's favor for \$800, but, upon defendant's motion, the court granted a new trial. On the trial now in question the jury, in addition to returning the general verdict, as above mentioned, answered in the affirmative the following interrogatory submitted to them at plaintiff's request:

"Was the conduct of the defendant in driving his automobile as shown by a preponderance of the evidence of a reckless character, such as to show an utter disregard for the safety and lives of other persons?"

Plaintiff's declaration consisted of five counts. In the first it is averred in substance that on November 8, 1924, defendant was driving his automobile in a westerly direction on 58th Street (an east and west street), Chicago, at and near its intersection with

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1970-1971

Source: U.S. Census Bureau, *Current Population Reports*, 1990.

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Source: U.S. Census Bureau, *Current Population Reports*, 1970, 1980, 1990, 2000, 2002, 2004, 2006, 2008, 2010, 2012, 2014, 2016, 2018, 2020.

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polymers of the cellulose, starch, and modified starch groups, respectively.

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Figure 18.48: A scatter plot showing the relationship between the number of hours spent studying and the number of hours spent sleeping. The x-axis is labeled 'Hours Studied' and ranges from 0 to 10. The y-axis is labeled 'Hours Slept' and ranges from 0 to 10. The data points are approximately: (1, 8), (2, 7), (3, 6), (4, 5), (5, 4), (6, 3), (7, 2), (8, 1), (9, 0), (10, 0). The points show a strong negative linear correlation.

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Woodlawn avenue (a north and south street); that plaintiff then and there was riding in another automobile, which was being propelled and operated in a northerly direction on Woodlawn avenue; that, while plaintiff was in the exercise of due care, etc., defendant so negligently operated his automobile that it collided with the automobile in which plaintiff was riding; and that thereby plaintiff was thrown against the sides, floor and other parts of the automobile in which he was riding and was permanently injured, etc. The second count charges that defendant so willfully and wantonly operated his automobile, and at such a high rate of speed, as to exhibit an entire absence of care for the safety of others, and that he knew or should have known that the probable result of his conduct would be to inflict injury upon persons then and there lawfully upon the public street. The third also charges willful and wanton negligence in the operation of defendant's automobile. The fourth is based upon the statute relative to the driving of a motor vehicle upon a public highway through residence portions of a city at a speed in excess of 15 miles per hour. The fifth is based upon an ordinance of the City of Chicago relative to the designation of certain streets in the city as "through traffic streets" (Woodlawn avenue, between 44th and 67th streets, being so designated), and relative to stop signs, and to the requirement that a person, operating any vehicle on any street which intersects a through traffic street, "shall bring such vehicle to a full stop before entering or crossing such through traffic street," etc. And it is averred that Woodlawn avenue, at the place of the accident, was within the terms of the ordinance, and was marked with a sign; that defendant, in violation of the ordinance, negligently failed to stop his automobile at the intersection; and that, as a result, it collided with the automobile in which plaintiff was

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riding, causing plaintiff's injuries, etc.

As to the details of the accident plaintiff and three witnesses called by him testified. As to the extent of his injuries he and two physicians called by him gave testimony. Defendant alone testified in his behalf.

The following facts in substance are disclosed from the evidence: At the time of the accident a football game was about to be played between the teams of two Illinois universities at Stagg field, Chicago. Automobiles were parked closely together on both sides of Woodlawn avenue, north and south of 58th street, and on both sides of 58th street, east and west of Woodlawn avenue. At about 2:30 o'clock, p.m., defendant was driving his automobile westerly on 58th street, at a speed of over 25 miles per hour, approaching Woodlawn avenue, which then was a "through traffic street" and then known by him to be such. At the same time a yellow taxi-cab was being driven by its chauffeur, Welleson, plaintiff's witness, northerly on the right hand side of Woodlawn avenue, at a speed of between 15 and 20 miles per hour, approaching 58th street. Plaintiff was the sole passenger in the cab seated on the rear seat inside. He had directed the chauffeur to take him to Stagg field. The cab entered the intersection first and was proceeding to cross 58th street. Defendant testified that, noticing the stop sign, he brought his automobile to a full stop before entering the intersection and looked to the south as far as he could, "but could not see any car approaching 58th street from the south until after I started," and for the reason that the cars parked alongside the south curb of 58th street obstructed his view. It, however, clearly appears from a preponderance of the testimony, and from the undisputed physical facts, that he

which, according to the evidence, was

as to the details of the evidence presented in this

witness called by the defendant. It is the duty of the jury

to find the defendant guilty or not guilty, and to return a verdict

accordingly in his behalf.

The following facts in evidence are stated from the

evidence: At the time of the shooting a football game was being

played between the team of the Illinois Institute of Technology

and the team of the University of Chicago. The game was being

played on the field of the University of Chicago, and the

game was being played at 3:30 p.m. on the day of the shooting.

At the time of the shooting, the defendant was sitting in the

stands of the University of Chicago, and was watching the game.

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did not stop his automobile at the intersection but kept right on, recklessly, at an excessive rate of speed. Plaintiff testified that he first saw defendant's automobile when it was only about 12 feet from the cab and when the cab was about at the center line of 58th street and slightly east of the center line of Woodlawn avenue; that he cried "Look out!" to the chauffeur, who instantly speeded up the cab, turning towards the left to avoid the impending collision; that immediately thereafter the collision occurred and plaintiff was thrown head first against some parts of the inside of the cab; and that "I did not know anything until I was taken out of the cab, when it was lying on its left side close to the northwest corner of the intersection." It further appears that defendant's automobile ran into the middle of the cab, breaking its right running board between the wheels, and also breaking the door on its right hand side "where the passenger gets in;" that the cab was propelled or pushed to the northwest about 30 feet, striking the west curb of Woodlawn avenue, just north of the north curb of 58th street, and turning over on its left side, its right side being upward and its bottom facing towards the east; and that, after both cars had come to a stop, defendant's car stood with its front wheels nearly against the bottom of the cab, between its front and rear wheels.

At the conclusion of plaintiff's evidence, and after he had introduced the city ordinance referred to in the fifth count of the declaration, defendant moved for a directed verdict in his favor, but the motion was denied. At the conclusion of all the evidence this motion was renewed, but it again was denied. And defendant's further motion, that the jury be instructed to find the defendant not guilty on the second and third counts (the willful

and not stop his attention to the investigation but kept right on.
Possibility of an extensive leak of agents. The only facilities that
he had for the investigation were the ones he had with him at that
time and when the day was over at the winter line of duty
arrived and finally went to the winter line of duty and arrived, then
he came back only to the winter line, and immediately proceeded up the
road, leaving towards the left to avoid the investigation facilities that
immediately thereafter the collection occurred and finally was taken
back there against some parts of the inside of the road and that I
did not know anything until I was taken out of the road, when it was
lying on the left side of the road in the northeast corner of the inter-
section. It looked against that island of a collection from into
the middle of the road, however, the right turning point before the
intersection, and also towards the road on the right hand side of the
intersection. The road was travelled at times in the north-
west about 15 feet, which the road was of regular width, but
north of the north end of this island, and running over on the left
side, the right side being against the road facing towards the
road; and that right side was now in a strip, between the car
stood with the front wheels nearly against the bottom of the car,
between the front and rear wheels.
At the conclusion of the investigation, and after he
had indicated the city collection referred to in the table above
of the collection, the road was now for a distance of 15 feet in the
left, but the road was closed. If the collection on all the
roadside this road was closed, but it could not be closed. And
therefore the road was closed. That the fact is indicated in that the
roadside was closed to the road and that road (the winter)

and wanton counts) of plaintiff's declaration, also was denied.

Defendant's counsel first contends that the court erred in submitting to the jury the question whether defendant was guilty of willful and wanton negligence as charged in said second and third counts. In our opinion, under the law of this State and the facts in evidence, there is no merit in the contention. In Heidenreich v. Bremner, 260 Ill. 439, 446, it is said: "Whether a personal injury has been inflicted by gross or wanton negligence is a question of fact to be determined by the jury. * *. It is not always easy to state what degree of negligence the law considers equivalent to wanton or gross negligence. The character of an act as being wanton or gross is greatly dependant upon the circumstances of each case. To constitute willful and wanton negligence it is not always necessary to prove that the defendant was actuated by ill-will toward the plaintiff. An entire absence of care for the life, person or property of others, if such as exhibits indifference to consequences, makes a case of constructive or legal willfulness, such as charges a person whose duty it was to exercise care with the consequences of a legal injury." In Wallgren Express Co. v. Krug, 291 Ill. 472, where it appears that plaintiff, a minor, was run over by defendant's auto-truck and permanently injured while he and other boys were playing ball in a public street, the Court says (p. 476): "One count of the declaration charged that the defendant failed to stop its automobile when danger was imminent and carelessly, recklessly and wantonly ran it upon and against the plaintiff. * *. Whether the negligent conduct of a defendant which has resulted in injury to another amounted to wantonness is a question of fact to be determined by the jury, if there is any evidence in the record fairly tending to show such a gross want of care as indicates a willful disregard of consequences or a willingness to inflict injury." In Brown v. Illinois

and reason (under) of the plaintiff's negligence, also was denied.

The defendant's counsel also contended that the plaintiff

in connection to the fact the question whether defendant was guilty of willful and wanton negligence as charged in said second and third counts. In our opinion, under the law of this State and the facts in evidence, there is no merit in the contention. In Hillman v. Brennan, 105 Ill. App. 2d, 441, it is said: "Whether a personal injury has been inflicted by gross or reason negligence is a question of fact to be determined by the jury." It is not always easy to state what degree of negligence the law considers equivalent to wanton or gross negligence. The distinction of an act as being wanton or gross is greatly dependent upon the circumstances of each case. To constitute willful and wanton negligence it is not always necessary to prove that the defendant was actuated by ill-will toward the plaintiff. An act is deemed to come into the list of wanton or gross if, at least as exhibited in negligence in connection with a case of negligence as legal negligence, such as to give a person whose duty it was to exercise care with the responsibility of a legal injury." In Hillman v. Brennan, 105 Ill. App. 2d, 441, 442, where it appears that plaintiff's minor son was over by defendant's son-in-law and permanently injured while he and other boys were playing ball in a public street, the court says (p. 442):

"One count of the petition charged that the defendant failed to stop its automobile when it was was imminent and negligently, recklessly and wantonly ran it over and against the plaintiff's son, resulting in serious and permanent injury to the plaintiff's son."

and another count of the petition charged that the defendant failed to stop its automobile when it was was imminent and negligently, recklessly and wantonly ran it over and against the plaintiff's son, resulting in serious and permanent injury to the plaintiff's son."

such a gross want of care as to constitute a willful disregard of one's responsibility as a willful injury." In Brown v. Illinois

Terminal Co., 319 Ill. 326, 331, it is said: "Plaintiff and defendant had a legal right to pass over the highway crossing, and each was required, in doing so, to observe due regard for the legal right of the other. A willful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of the impending danger, to exercise ordinary care to prevent it, or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care." In the present case it appears from the testimony of the chauffeur of the cab in which plaintiff was riding, and from that of plaintiff's disinterested witness, Potter (who was driving his automobile southerly in Woodlawn avenue, approaching 58th street, and who saw the approach to the intersection of both the cab and defendant's automobile and the collision and what followed), that defendant's automobile entered the intersection, without stopping, at a speed in excess of 25 miles per hour. The only conflicting testimony is that of the defendant alone, who claimed that just before he reached Woodlawn avenue the speed of his automobile was not in excess of 8 miles per hour, and that he stopped and then started again. But the physical facts as to the collision and the happenings thereafter are to the contrary. And, clearly, there was abundant evidence to go to the jury on the question whether defendant, in attempting to drive his automobile across the intersection in the manner he did, was guilty of willful and wanton negligence as defined in the decisions above mentioned. And we think that the jury were amply justified in answering in the affirmative the special interrogatory submitted to them, above set forth. Defendant's counsel complains of its language and contends that "an utter disregard for the safety and lives of other persons"

is not a willful disregard, and that the affirmative answer to the interrogatory "is not a finding of willful and wanton conduct." We think that this amounts to quibbling. One of the definitions of the word 'utter,' as found in Webster's New International Dictionary of 1910, is "complete; total; entire; absolute." One of the definitions of the word 'willful', as given in the same dictionary, is "self-determined; voluntary; intentional." In Illinois Central R. Co. v. Leiner, 202 Ill. 624, 632, the Court impliedly approved an instruction, defining willful and wanton misconduct, in which the words "an utter disregard for the safety and lives of other persons" were used, as follows: "The court instructs the jury that what is meant by willful and wanton misconduct is such conduct as amounts to an intentional wrong, or of such a reckless character as shows that the person or persons, guilty of such misconduct, were at the time acting in such a manner, as shows that they had an utter disregard for the safety and lives of other persons." and we think that the special interrogatory submitted in the present case was, in view of the evidence, easily understandable by the jury and capable of being answered by them either in the affirmative or negative.

Counsel also contends that the court erred in admitting in evidence the ordinance of the City of Chicago, referred to in plaintiff's fifth count, and for the reason that no sufficient proof was made that the accident happened in said city. When the ordinance was admitted in evidence no objection to its introduction was made by defendant's attorney. Indeed, he stated at the time that "we are willing to stipulate that at the time of the accident Woodlawn avenue was a through street, and that (the ordinance) required all persons approaching it to stop." Furthermore, it sufficiently appears from the testimony of plaintiff's witness, Cloonan, a police officer of

said city, that the place of the accident was located within said city.

Counsel complains of certain remarks of the judge made during the progress of the trial as being prejudicial to defendant. He also urges that the court erred in certain rulings admitting evidence offered by plaintiff and rejecting evidence offered by defendant. We have considered each and all of these claimed errors. No useful purpose will be served in discussing them at length. Suffice it to say that we find that in some instances no objection was made at the time to the court's remarks or rulings, here complained of for the first time, and that in the other instances, where objection was aptly made, we do not think that the remarks and the rulings, even if they be considered as erroneous, were so prejudicial to defendant as to require a reversal of the judgment.

Counsel further contends that the court erred (1) in giving certain instructions offered by plaintiff, (2) in refusing others offered by defendant, and (3) in improperly modifying others offered by defendant and giving them to the jury as modified. We have spent considerable time in examining the given instructions, and believe that the jury were fairly instructed and that the judgment should not be reversed because of any claimed errors in the court's rulings on instructions. Considerable stress is laid upon the giving, as modified, of an instruction offered by defendant. Notwithstanding that the court gave to the jury at plaintiff's request two proper instructions relative to the meaning of "willful and wanton misconduct," defendant offered the instruction that "it takes more than ordinary negligence, as defined in these instructions, to make out a case of willfulness and wantonness; one cannot be said to be guilty of willfulness or wantonness unless he has been guilty of misconduct and malice, or of some act from which misconduct and malice ought to be inferred." We

and will, that the place of the witness was located within said city.

"General complaint of certain members of the judge's court."

During the progress of the trial as being conducted in accordance

with the rules of the court, the court stated in certain instances that the

deeds of the witness were not sufficient to be taken as evidence by the

court. He has considered each and all of these alleged facts, and

general purpose will be served in disclosing them as follows. Nothing

is so easy as to find that in some instances no witness was made

at the time of the court's removal of the witness, some instances of

the first time, and that in the second instance, the witness

was again made, so as not to find that the witness was not reliable, even

if they be considered as statements, were so prejudicial as to be

so as to render a verdict of the jury.

"General complaint of certain members of the court that in giving

certain testimony which is false, the witness is not reliable."

During the progress of the trial, the witness stated that he

by himself and giving him in the fact as stated. He has again

considerable time in examining the facts in question, and believe

that the fact was fully investigated and that the witness should not

be removed because of any alleged errors in the court's ruling on

the witness. The witness stated that he had been the witness, he stated,

of an interesting matter by himself. He has considered each and

every fact as the fact of the witness's statement and has

relative to the meaning of "will" and "shall" and "must" and "may"

offered the instruction that "it is not to be taken as a matter of

as decided in these instances, he has not a case of evidence

and testimony and cannot be said to be guilty of evidence in some

more cases as has been said of the witness and judge, so as to

and from which evidence was given, which is to be taken, so as

think that the instruction as offered was misleading and incorrect and should have been refused. The court, however, modified it by striking out the words "and malice" as above italicized, and gave it to the jury as modified. Defendant is in no position to complain of the court's action or of the instruction as given, as has frequently been decided. (Johnson v. City of St. Charles, 208 Ill. App. 184, 191; Grannon v. Donk Bros. Coal Co., 173 id. 395, 406, and cases there cited.)

Counsel finally contends that the damages of \$3,000 as awarded by the jury are excessive. We do not think that they are, when consideration is given to plaintiff's testimony as to the injuries he received, his pain and suffering, and expenses incurred, and as to the permanency of some of his injuries as testified to by his attending physician and by another physician who examined him more than two years after the accident. Furthermore, under the evidence, the jury would be warranted in also awarding exemplary damages, they having found that plaintiff's injuries were proximately caused by the recklessness and wanton negligence of defendant. (Consolidated Coal Co. v. Haenni, 146 Ill. 614, 628; Chicago Traction Co. v. Mahoney, 230 Ill. 562, 568; Snedden v. Illinois Central R. Co., 234 Ill. App. 234, 248.)

Finding no reversible error in the record the judgment of the circuit court is affirmed.

AFFIRMED.

Seanlan and Barnes, JJ., concur.

32748

JOHN POTEMPA, a minor, by his
next friend, Albert Potempa,
Appelles,

v.

J. F. CULP,

Appellant.

6999
250 I.A. 645'

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE GRIBLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$6,500, entered against defendant after verdict on March 3, 1928, in an action for damages for personal injuries received by plaintiff, a boy of 11 years of age, about noon on August 30, 1926, and occasioned by his being struck or run over by defendant's automobile.

In one count of plaintiff's declaration, to which defendant pleaded the general issue, it is averred that on the day mentioned in Chicago defendant, by his servant, was driving his automobile in a northerly direction in a public alley, which runs between two public streets, known as Kedzie avenue and Troy street, and is intersected by another public street (running east and west) known as 45th street; that defendant was in the act of driving his automobile out of the alley and into 45th street, and plaintiff, a minor, was then and there passing over and across the alley; that before and at the time of the injury he was in the exercise of such care as is required of one of his age, intelligence, experience and capacity; and that defendant by his servant then and there so negligently operated and propelled the automobile that it ran into, against and over plaintiff, and he suffered serious and permanent injuries, etc.

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Upon the trial two photographs were introduced in evidence, from which and from the testimony of witnesses it appears that on the south side of 45th street, just north of the east and west building line, there was a cement sidewalk, about 5 feet wide, and between it and the curb there was a grass plot about 15 feet wide; and that, standing immediately south of and flush with the sidewalk and also flush with the east alley line, there was a garage, which obstructed the view of a pedestrian, going west on the sidewalk and about to cross the alley, of any vehicle coming out of the alley, and which likewise obstructed the view of the driver of such vehicle of such pedestrian.

As to the accident plaintiff testified, as did also for him two witnesses, - Stanley Tegryn, a boy aged 17 years, and a Mrs. Soczopnik. Neither of these two witnesses saw the collision. They were on the opposite (north) side of 45th street, on the sidewalk, and their attention was attracted to the place of the accident by the "squeaking" or noise of the brakes of an automobile. For defendant, as to the accident, the only witness was Edward J. Gallagher, 20 years of age, the driver of the automobile.

As to the nature and extent of his injuries plaintiff gave testimony in chief, as did also for him two physicians, - Dr. Raymond, who attended him for the first month that he was in the Cook county hospital, and Dr. Adams, who took an X-ray picture (introduced in evidence) of plaintiff's left leg about 15 months after the accident. For defendant there was the testimony of Dr. Phillips, a licensed physician and who in his drug store examined plaintiff and rendered first aid to him. In rebuttal, Dr. Adams further testified as a medical expert.

Plaintiff testified that he was walking west on the south

Upon the table two photographs were placed in this
 house, from which and from the testimony of witnesses it appears
 that on the south side of this street, just north of the hotel and
 west of the building, there was a narrow sidewalk about 1 foot wide,
 and between it and the main house was a space just about 1 foot wide;
 and that, standing immediately north of this space with the sidewalk
 and also with the east side of the house, there was a fence, which
 constituted the view of a pedestrian going west on the sidewalk and
 about to cross the alley. It was visible coming out of the alley, and
 which likewise constituted the view of the driver of each vehicle of
 each pedestrian.

As to the position of the witness, he also saw
 the two witnesses - looking toward the alley, and a
 Mrs. Thompson. Witness at that time observed the collision.
 They were on the opposite (west) side of this street, on the side
 west, and that a collision was observed to have taken place at the corner
 by the "cornering" or union of the driver of an automobile. Mrs.
 Thompson, as in the report, has only observed the accident. Witness,
 20 years of age, the driver of the automobile.

As to the witness and driver of the bicycle, witness gave
 testimony in which he did also see the two witnesses - the witness,
 who attended him for the first month after he was in the hospital
 hospital, and Dr. Jones, who gave him a very positive statement as to
 cause of accident. He left the hospital 10 months after the accident.
 The statement given was the statement of Dr. Jones, a physician
 residing and who in the time given was a resident and licensed
 first aid in the hospital. The witness further stated that as a
 medical expert.

sidewalk of 45th street, approaching the alley, about one foot north of the garage; that he did not see defendant's automobile before he stepped into the alley; that after he was in the alley he saw it "right on top" of him and it immediately "bumped" him; that he thinks, but is not sure, that its right front wheel ran over him; that he became dazed but remembers being picked up and taken to a doctor's office; and that he did not "come to" until he found himself in the hospital. The boy, Stanley, testified that, hearing the "squeaking" of brakes, he looked and saw plaintiff lying on the ground near the automobile; that he ran across the street and assisted the driver in picking plaintiff up and taking him to the drug store; that when he reached the place of the accident he saw that the front end of the automobile was "about 7 feet out past the curb line, facing north;" that plaintiff was lying about on the curb line and immediately east of the right rear wheel of the automobile; that there were certain "skid marks," which "begin almost at the building line and lead to about two or three feet south of the curb line;" that while the witness was at the drug store and plaintiff was receiving first aid there, the driver of the automobile told him to go home and "not say anything to anyone about the accident;" and that he then went home and shortly thereafter visited the place of the accident and again looked at the skid marks. Mrs. Sczepanik testified that she was walking east on the north side of 45th street and was near the alley when she heard the noise of brakes, stopped, and looked across the street but did not cross over; that she saw a boy lying there, about even with the south curb line and east of and alongside of an automobile; that the automobile was facing north, the front of which "was 7 or 8 feet out in the street, north of the curb line;" and that she did not hear the sound of any automobile horn before hearing the noise of brakes.

himself at this street, approaching the alley, about the foot north
 of the garage; that he saw the automobile before he
 stopped in the alley; that after he saw the alley he saw it
 "right on top" of him and it immediately "stopped"; that he knows
 but he does not, that the light truck would not have been there
 because of the truck being picked up and taken to a garage's
 office and that he did not "know" that he would be found himself
 in the hospital. The next morning, he called that, hearing the
 "reporting" of the truck, he knew and was positively sure on the ground
 near the automobile; that he saw the truck and entered the
 driver in his car; that he was taking him to the street; and
 when he reached the place of the accident he saw that the truck and of
 the automobile was "about 7 feet and was the very line, facing north."
 That "Lafayette" was lying about on the side line and immediately went to
 the right side of the automobile; that there were several "with
 marks," which "marks" showed on the ceiling line and that he found the
 or later left with it the very line; that while the witness was at the
 street alone and Lafayette was waiting first at home, the driver at
 the automobile told him to go home and "not say anything to anyone about
 the accident," and that he then went home and shortly thereafter visited
 the place of the accident and again looked at the truck marks. etc.
 He further testified that the car falling onto the north side of this
 street and was near the alley when he heard the noise of the truck
 stopped, and indeed saw the driver and his car when they were at
 the very first moment, about 7 feet from the car; that the car was at
 and Lafayette at an automobile; that the automobile was facing north,
 the front of which "was 7 or 8 feet not in the street, north of the
 front line," and that the car was the second of any automobile seen
 heading the noise of the truck.

Gallagher, the driver of the automobile, denied making the statements to the boy, Stanley, at the drug store. He further testified; That, as he was moving north in the alley, he noticed the garage to his right and sounded his horn and came to a "dead stop;" that then the front of the automobile was just south of the building line and its right fender "was a foot and a half west of the garage;" that he could see only a little of the cement sidewalk to his right, possibly the "first square" of it; that he started again, moved at a slow speed and, almost instantly, "this boy ran into the right front fender," and "bounded back;" that at this time the front of the automobile was about a foot and a half past the corner of the garage; that when he again stopped, its "front end was a foot and a half or two feet on the sidewalk;" that he got out and picked plaintiff up, who then was lying east of the automobile with his feet about a foot from it, and put him in the automobile and started it again "to get him to a drug store;" that plaintiff "jumped out" and he again stopped the automobile and "went to get him and he struggled with me;" that at this time "the machine was in the street;" and that, with the assistance of "this other boy" (Stanley), he again picked plaintiff up and took him to the drug store. Dr. Phillips, defendant's witness, testified that at the drug store plaintiff talked about the accident and said that "he ran into an automobile coming out of an alley."

Defendant's counsel contend that, on the questions of the negligence of the driver of the automobile and plaintiff's contributory negligence, the verdict is against the weight of the evidence. We cannot agree with the contention. We think that, from all the testimony and the physical facts disclosed, the jury were warranted in believing that Gallagher negligently drove the automobile out of the alley and over the public sidewalk at an excessive speed, considering the location

...the driver of the automobile, having seen the
statement of the boy, ... at the same time. He further testified
that, as he was moving north in the alley, he noticed the garage in
his right and ... his ... to a "good place" that ...
the front of the automobile was just ... of the building line and
the right ... was a ... and ... of the garage, that he
could see only a ... of the ... to his right, possibly
the "first ... of ... that he ... again, ...
... and, ... "that boy ... the first ...
and " ... back" ... at this time the ... was
about a ... and a ... of the ... that was in
again ... the " ... and a ... on the ...
... that he ... picked ... who ...
... with his ... a ... in, and ...
in the automobile and ... it again "as ... a good place"
last ... " ... and he ... the automobile and
" ... and he ... at this time " ...
... in the ... and ... the ... of " ...
... by " ... by ... up ...
the ... the ... the ...
at the ... the ... and ...
" ... at ... of an alley."
... the ... of the
... of the ... and ...
... the ... of the ...
... the ... from all the ...
and the ... the ... in ...
... the ... of the alley and
... the ... as an ... the ...

of the garage and its obstruction of the view. And we think that it was peculiarly within the jury's province to decide whether, at and immediately before the time of the accident, plaintiff was in the exercise of such ordinary care as is required of a boy of his age, experience and intelligence.

Counsel further contend that the judgment should be reversed on account of the admission of certain expert testimony of plaintiff's witness, Dr. Adams, because (1) it was given in rebuttal, and (2) it usurped the province of the jury on an ultimate issue of fact. Dr. Adams, as a part of plaintiff's case in chief, had testified as to the condition of, and the permanent injury to, plaintiff's left leg as disclosed from the x-ray picture taken in November, 1927, etc., and Dr. Raymond, plaintiff's witness, had testified to the nature and extent of the injuries as found by an examination made of plaintiff when he reached the hospital immediately following the accident, and also as to an operation there subsequently performed upon him, etc. Dr. Raymond's testimony had been to the effect that upon his first examination he found that "there was a contusion and laceration of the left leg, through which the tibia protruded;" that both bones were broken; that the soft tissues and muscles were "crushed and bruised;" that at the time of the operation he discovered that there was a "compound, comminuted fracture;" that "the bone was not broken clearly, but there were small fragments;" that the wound was not a clean one - there being "street dirt" in it - and "anti-tetanus was given;" and that, thereafter, a "bone infection developed, from which there was a discharge," which continued for more than a month. Dr. Raymond was not cross-examined. The only medical testimony offered by defendant, during the presentation of his case, was that of Dr. Phillips, who testified as to plaintiff's condition as found from his examination

made at the drug store before plaintiff was taken to the hospital. After stating that there was a compound fracture of two bones of the leg, lacerations, etc., he testified "I wouldn't say there was a crushing injury." In rebuttal, Dr. Adams was asked his opinion as a medical expert based upon a hypothetical question, as to a hypothetical boy of 11 years of age, who was running along a sidewalk approaching an alley, and who, as an automobile suddenly emerged from the alley, "ran into the right front fender and bounced backward," etc., and who received certain stated injuries to his left leg (shown by the evidence). Defendant's only objections to the question were that it should have been asked when plaintiff was putting in his case in chief, and that it was "unfair" to defendant to have such a question asked in rebuttal, when defendant's witness (Dr. Phillips) was no longer in the court room, and there was not time for defendant to procure other expert testimony. No objection was made at the time as to the competency or materiality of the question or that an answer thereto would usurp the jury's province. The court overruled the objections, and stated that he would "wait half an hour." Defendant's attorney made no attempt to follow the court's suggestion and stated that "he could not get a doctor here within half an hour." Thereupon, Dr. Adams was allowed to answer the question, as follows: "It is my opinion that a fracture such as you describe could not, with reasonable medical certainty, be brought about or produced by a child of that age running into the fender of a machine." No motion was made by defendant's attorney to strike the answer upon any ground. Thereupon Dr. Adams was asked the further question: "Have you an opinion as to whether or not it could be produced without some weight or crushing injury?" Upon defendant's attorney making the same objections, the court ruled that the witness might answer, which he did, as follows: "You described a

fracture which was necessarily the result of crushing." No motion was made by defendant's attorney to strike this answer upon any ground, and he stated that he did not desire to cross-examine the witness.

We do not think that the court committed reversible error in these rulings, as contended. Plaintiff's evidence tended to show that he was struck violently by a front part of defendant's automobile or run over by its right front wheel, or both, and that, whether so struck or run over, he suffered a "crushing" injury to his left leg. The version of defendant's driver was that plaintiff "ran into the right front fender" and "bounded back" out of the path of the automobile. And defendant's witness, Dr. Phillips, testified that, from his examination of plaintiff in the drug store, he "wouldn't say there was a crushing injury." Plaintiff was entitled to rebut this evidence, which was to some extent contrary to his theory as to how the injuries were received. (City of Sandwich v. Bolan, 141 Ill. 438, 440; Ordway v. Buckingham, 152 Ill. App. 45, 47.) And whether such rebuttal evidence should be admitted rested largely in the discretion of the trial judge. (Floto v. Floto, 233 Ill. 606, 611; Underlich v. Buerger, 287 Ill. 440, 444.) And expert testimony may be introduced in rebuttal (William Grace Co. v. Larson, 287 Ill. 101, 104); and even in sur-rebuttal (City of Rock Island v. Starkey, 139 Ill. 518, 521.) As to counsel's further contention that the answers of Dr. Adams usurped the jury's province, we do not think that defendant is in any position to raise the point in a reviewing court, even assuming that there be some merit therein. The rule is well settled that an objection to the introduction of evidence, based solely upon a particular point or points specified, is a waiver of objections to other points not specified or relied upon. (Prairie Du Rocher v. Milling Co., 248 Ill. 57, 61; Terre Haute, etc. R. Co. v. Voelker, 129 Ill. 540, 548.)

Counsel further contend that the damages are excessive, that the trial judge erred in making certain remarks in the jury's presence concerning one of defendant's witnesses, and that the court erred in the giving of certain instructions offered by plaintiff and in the refusal to give others offered by defendant. When the extent of plaintiff's pain and suffering is considered, as well as the permanent shortening of his left leg, we do not think that the verdict is excessive. As to the judge's remarks, claimed to be prejudicial, we do not think that there should be a new trial awarded because of them. Furthermore, it does not appear that any objection or exception was made to them at the time, which is necessary in order to have the point saved for review. (Public Service Co. v. Leatherbee, 311 Ill. 508, 508; Chicago City Ry. Co. v. Carroll, 206 Ill. 313, 330.) As to the given instructions we think that the jury were fully and fairly instructed, and that the judgment should not be reversed on account of any errors, if errors they were, in any of them. And we do not think the court committed reversible error in refusing to give any of the refused instructions offered by defendant, as urged.

Our conclusion is that the judgment appealed from should be affirmed, and it is so ordered.

AFFIRMED.

Scanlan and Barnes, JJ., concur.

General Tilden claims that the United States
 that the trial judge acted in similar manner in the jury's
 presence, and at defendant's expense, and that the
 court acted in the light of certain instructions offered by plain-
 tiff and in the light of the facts offered by defendant. When
 the extent of plaintiff's claim was considered in connection, we will
 as the parties' testimony of the first day, we do not think that
 the verdict is excessive. We do not think that the jury's verdict is so
 prejudicial, as to not think that there should be a new trial granted
 because of them. Furthermore, it does not appear that any objection
 or exception was made to them at the time, which is necessary in
 order to have the point raised for review. Reversed.
Reversed, 111 Ill. 2d, 304; Reversed, 111 Ill. 2d, 304. Reversed, 111
 Ill. 2d, 304. It is the duty of the jury to find the facts and
 apply the law to the facts as found. We do not think that the jury's verdict was
 so prejudicial as to require a new trial. It seems to us, in view of
 them, that we do not think the court committed reversible error in
 refusing to give any of the various instructions offered by defendant,
 as urged.

Our conclusion is that the judgment appealed from should be
 affirmed, and it is so ordered.

1897.

Reversed and Remanded, 111 Ill. 2d, 304.

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POTTS-TURNBULL ADVERTISING CO.,
a corporation,

Appellee.

v.

FELTMAN & CURRAN SHOE STORES CO.,
a corporation,

Appellant.

250 I.A. 645²

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE GRINERY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract, tried without a jury, the court, on March 14, 1928, found the issues in plaintiff's favor and assessed its damages at the sum of \$671.26, - the full amount of its claim. Judgment against defendant was entered upon the finding and this appeal followed.

From plaintiff's amended statement of claim, filed March 1, 1927, it appears that the claim was for a balance due for certain advertising, etc., furnished to defendant at its request, as per account attached to the statement of claim, as follows:

"1925

| | | |
|---------|-------|------------------|
| Oct. 16 | Adv. | \$398. |
| 26 | Edry. | 257.86 |
| 26 | | 773.43 |
| 28 | | 376.08 |
| 31 | | 23.51 |
| Dec. 15 | | 207.98 |
| 31 | | 1.53 |
| | | <hr/> \$2,038.36 |

1926

| | | |
|--------|------|-----------------|
| Jan. 4 | Cash | \$150.88 |
| " 4 | " | 1216.22 |
| | | <hr/> \$1367.10 |

Balance due

\$671.26"

Defendant's only defense was that of accord and satisfaction. It alleged in its affidavit of merits in substance that on December 29, 1925, there was a bona fide dispute between the parties as to the amount that defendant then owed plaintiff; that on said day agents of the respective parties met and examined the account and "compromised and settled" plaintiff's claim against defendant for the sum of \$1216.22, which said sum thereafter was paid to plaintiff "in satisfaction and compromise of, and in full payment of, said indebtedness;" that thereafter said agents met and ascertained that in said settlement the sum of \$150.88 had erroneously been allowed to defendant for certain discounts; that thereafter on January 4, 1926, defendant paid said sum of \$150.88 to plaintiff; and that by reason of said two payments there was "effected a full settlement, compromise and release of all claims and demands of plaintiff against defendant."

On the trial, to sustain its affirmative defense, defendant called as its only witness its manager of sales, Albert E. Kramer, and he was examined and cross-examined at considerable length. During his examination two of defendant's checks, for \$1216.22 and \$150.88 respectively, payable to plaintiff's order, a letter of defendant to plaintiff dated January 4, 1926, and certain other written instruments were received in evidence. The check for \$1216.22 is dated December 29, 1925, and the check for \$150.88 is dated January 4, 1926. Neither bears any statement thereon that it is given in settlement of any account. Both show that they were endorsed by plaintiff and cashed on January 6, 1926. Defendant's check for \$1216.22 was enclosed in the letter to plaintiff of January 4, 1926, in which defendant, by said Kramer, wrote as follows:

"Attached hereto you will find our check amounting to \$1216.22, which covers invoices of October 26th, 28th and 31st.

Defendant's only defense was that of mental incompetence. It appeared in the exhibits of notes in defendant's file on January 27, 1961, there was a handwritten note between the parties as to the amount of the defendant's own mental incompetency that an expert opinion of the respective parties had obtained the records and "competency and mental" defendant's claim against defendant for the sum of \$100,000.00, which said was defendant's own claim to plaintiff "in consideration and compromise of, and in full payment of, said indebtedness." That there after said agency had been established that in said settlement the sum of \$100,000.00 had been received from plaintiff in consideration for plaintiff's account that thereafter on January 2, 1961, defendant said said sum of \$100,000.00 to plaintiff and that in return of said the payment there was "received a full settlement, compromise and release of all claims and demands of plaintiff against defendant."

On the other, in certain the defendant's defense, defendant relied on the only witness the manager of said, David J. Brown, who on the evidence and cross-examination at defendant's hearing, during the examination of the defendant's witness, the \$100,000.00 and \$100,000.00 respectively, plaintiff to plaintiff's order, a letter of reference to plaintiff dated January 2, 1961, and certain other written documents were received in evidence. The check for \$100,000.00 is dated December 21, 1960, and the check for \$100,000.00 is dated January 2, 1961. That said party and defendant intend that it is given in payment of any amount. With more that they were entered by plaintiff and cashed on January 2, 1961. Defendant's check for \$100,000.00 was entered in the ledger of plaintiff on January 2, 1961, in which defendant, by said Brown, wife

as follows:

"I stated before you all that said amount is \$100,000.00, which money I received at defendant's, 1961 and 1962."

In making settlement, we have not taken into consideration your invoice of December 15th amounting to \$207.98, nor your invoice of October 16th, amounting to \$398.00, these invoices covering magazine advertising and mechanical parts, inasmuch as this advertising was run without our authorization and against our wishes. Your Mr. Quinlan has admitted this, and can fully explain these deductions.

You are, however, to bill us for an item of \$25 and another item amounting to \$9.02; also 15% on 10,000 booklets at \$322, and 100,000 circulars at \$457.07. These items were deducted in error by us. As soon as corrected invoice has been received by us, remittance will be made." (These items amount in the aggregate to \$150.88.)

On direct examination Kramer testified in substance that, as to said advertising, he dealt entirely with a Mr. Quinlan, plaintiff's representative; that he objected to the payment of the items on plaintiff's account of \$398 and \$207.98 for the sole reason that, though the advertisements had been published, the copy thereof had not been submitted to him for his "O.K." prior to publication; and that because of this fact Quinlan had verbally agreed with him to make a compromise settlement on the basis of eliminating said items and giving a certain discount on some of the other items. On cross-examination he admitted that all the items (except those of \$398 and \$207.98) on plaintiff's account were "correct," and further testified that he had several conversations with Quinlan after January 4, 1926, regarding a settlement of the two disputed items; that "he (Quinlan) wanted to know whether we would compromise the matter at \$250;" that "I replied that I didn't think so, but that, if it would help him out, I would be willing to compromise it for \$150;" that he said he would think it over and advise, but that this "was the last I heard of it;" that he (Kramer) "was willing to give \$150 to him;" but that, "as it turned out, there was no compromise."

In view of the evidence we are of the opinion that defendant did not sustain the burden of proving its affirmative defense of accord and satisfaction, and that the trial court was fully warranted

in entering the judgment appealed from. In Canton Union Coal Co. v. Parlin & Orendorff Co., 215 Ill. 344, 247, it is said: "To constitute an accord and satisfaction it is necessary that the money or check, or whatever is offered, should be offered in full satisfaction of the demand, and should be offered in such a manner or accompanied by such acts or declarations as amount to a condition that, if the party to whom it is offered takes it, he does so in satisfaction of his demand." In the present case there is nothing endorsed on the check of \$1216.22, or contained in defendant's letter of January 4, 1926, (which accompanied the check) that indicates that if plaintiff accepted the check (which it did), such acceptance was to be in satisfaction of all of plaintiff's demands to date. In the letter defendant writes "we have not taken into consideration" said invoices of October 18th and December 15th, of \$398 and \$207.98 respectively.

The judgment of the Municipal court should be affirmed and it is so ordered.

AFFIRMED.

Beanlan and Barnes, JJ., concur.

32777

SADIE FEDER,
Plaintiff in Error,

v.

NEW YORK LIFE INSURANCE CO.,
Defendant in Error.

700/2
250 I.A. 645³

BRANCH TO CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

The sole question involved in the present case is whether, on the trial of the consolidated actions to recover the "double indemnity benefit" on two life insurance policies aggregating \$8,000, the court erred in instructing the jury, at the close of all the evidence, to return a verdict in favor of the defendant company and in entering judgment thereon against plaintiff.

On the morning of Friday, October 15, 1926, Harry Feder, 34 years of age and husband of plaintiff, met sudden death either by accidentally falling from, or intentionally jumping out of, the window of his private business office on the 11th floor of the Conway Building, corner of Washington and Clark streets, Chicago, which window faced west on the square, interior court of the building. He had taken out a number of policies on his life of the aggregate face amount of over \$150,000, and had borrowed money on some of them. The two sued upon were identical in their terms and plaintiff was by amendment the named beneficiary in each. One was for \$3,000 and the other for \$5,000, and each contained a provision for the payment of "double the face of the policy" upon due proof "that the death of the insured resulted directly and independently of all other causes from bodily injury effected solely

2277

2501A.015

STATE OF NEW YORK
IN SENATE
JANUARY 1, 1904

REPORT
OF THE
COMMISSIONER OF THE LAND OFFICE

ALBANY:
J. B. LEECH, STATE PRINTER,
1904.

THE COMMISSIONER OF THE LAND OFFICE HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF THE REPORT OF THE

THE LAND OFFICE HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF THE REPORT OF THE

ON THE PART OF THE COMMISSIONER OF THE LAND OFFICE TO THE SENATE

IN THE YEAR 1903, THE LAND OFFICE HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF THE REPORT OF THE

THE LAND OFFICE HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF THE REPORT OF THE

AND TO THE SENATE, THE LAND OFFICE HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF THE REPORT OF THE

IN THE YEAR 1903, THE LAND OFFICE HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF THE REPORT OF THE

ON THE PART OF THE COMMISSIONER OF THE LAND OFFICE TO THE SENATE

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through external, violent and accidental causes," and a further provision that "this double indemnity benefit will not apply if the insured's death resulted from self-destruction, whether sane or insane." In due time defendant paid to plaintiff, as beneficiary, the aggregate amount of the face of the policies, but it refused to pay the amount of the double indemnity.

The actions were commenced on February 8, 1927. In plaintiff's amended declaration she alleged that the insured met instant death from "accidental" injuries received from a fall on to an iron barricade. Defendant pleaded the general issue and gave notice of the special defense that it was not liable for the double indemnity because the death did not result from "accidental" causes, but from "self-destruction while insured was sane or insane."

Upon the trial defendant admitted that at the time of the death the policies were in full force and effect, and that due notice and proofs had been given as required. Plaintiff introduced the policies in evidence without objection, testified as a witness in her own behalf and called four other witnesses. None saw the actual occurrence, but all testified as to the movements of the deceased prior thereto on the morning in question, his then bearing and apparent condition of mind, his habits and temperament and to certain circumstances. Their testimony tended strongly to show the absence of any motive on his part to commit suicide, and it was proper to have it introduced during plaintiff's case in chief, defendant having pleaded that deceased had suicided, in anticipation of such defense. (Wilkinson v. Aetna Life Ins. Co., 240 Ill. 205, 215; Bimick v. Downs, 82 id. 570, 572.) At the conclusion of plaintiff's evidence defendant did not move for a directed verdict

the aggregate amount of the loss of the business, and is subject to the same amount of the business loss.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

[illegible]

There is a great deal of evidence that at the time of the death the patient was in full view and heard, and that the notes and reports were given as required. The patient is evidence without objection, furnished as a witness in his own behalf and called for other witnesses. There was the actual occurrence, but it is divided as to the movements of the deceased after leaving the building in question, his time leaving and entering building of work, his habits and movements and so on. The patient is a witness. Their testimony should be given the patient of any matter as to the facts of the case, and it is proper to have it introduced before the jury. It is a matter of fact.

of such interest: WILLIAM W. WARD, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307

in its favor. Its counsel, in their brief here filed, state that they then conceded that plaintiff had made out a prima facie case of accidental death, and further state: "We concede that had this defendant offered no testimony * * the plaintiff's prima facie case, however fragile, would have entitled her to recover."

Defendant called four witnesses, - James H. Coy and Ida Zelenke, who testified as to seeing portions of deceased's fall; David V. Nelson, superintendent of the building, who saw deceased's body after the fall lying on a heavy iron screen over a skylight in the court, and who shortly thereafter interviewed the occupants of the suite of which deceased's private office was a part, and examined the window and its surroundings; and Harry H. Chapman, who recently had had business dealings with deceased. Defendant also introduced a photograph of a portion of the court, showing the window of deceased's private office and also those windows out of which Coy and Zelenke, respectively, claim they were looking at the time of the occurrence; a photograph of the interior of Coy's office, disclosing through its more easterly window the window of deceased's private office in the distance; a copy of the inventory of the estate of Harry Feder, deceased, filed in the probate court of Cook county on February 9, 1927; and a copy of an unsigned draft of a proposed agreement and declaration of trust, purporting to be between Chapman and wife and Harry Feder and to be dated October 11, 1926 (four days before the occurrence).

At the conclusion of defendant's case plaintiff did not introduce any further evidence in rebuttal, but rested, and thereupon, on defendant's motion, the court instructed the jury and entered the judgment as above mentioned.

From plaintiff's testimony and that of her witnesses it appears that Harry Feder had been married to her about four years;

that they had no children but had adopted a female child of tender years; that their family life was happy and pleasant and that they indulged in many social activities; that he was an active, healthy man, fond of athletics and outdoor sports, about 5 feet 9 inches in height and weighed about 160 pounds; that he had a sunny temperament and happy disposition, and many friends; that early in his business career he had been associated with his father in the dry-goods business; that subsequently he had engaged in the real estate business on his own account, had bought and sold apartment buildings and had acquired capital assets, worth probably about \$30,000, from the profits of the business; that latterly he had been loaning money, buying and selling first and second mortgages on improved real estate, and investing the money of friends and clients on such mortgages, receiving commissions for his work; that apparently his business had been successful and profitable and was increasing in volume; that he was on the best of terms with his father-in-law, Samuel Weinberg, who resided about a block away in the same neighborhood in Chicago; that Weinberg had from time to time given him the aggregate sum of \$120,000 to invest in mortgages or to assist him in his business, and was accustomed to advise him relative to the conduct thereof; that while Feder and plaintiff were having breakfast at their home on the morning of the occurrence, Weinberg called, as was his custom, and there was talk about attending a football game at Ann Arbor, Michigan, the following day, and about exchanging at a downtown theater certain coupons for regular theater tickets, which Feder agreed to do on the way to his office; that thereafter Feder and Weinberg went downtown together and to the theater, where Feder exchanged the tickets and, from a nearby cigar store, immediately telephoned plaintiff that the exchange had been made and reminded her to write a certain letter so as to

be sure to obtain the tickets for the football game at Ann Arbor; that Feder and Weinberg then went together to the Conway Building, - Feder going to his office on the 11th floor and Weinberg stopping for a few minutes at a toilet on that floor; that the number of the office suite was 1142; that there were three private rooms opening from the outer office or reception room, each of which had one window facing west into the court; that one Hachtman and his stenographer, Miss Engdahl, occupied two of the rooms, and Feder the third; that one Asch had a desk in the outer office near Feder's door; that Feder's window was in the center of the west wall; and that immediately in front of and below the window was a radiator and upon it was a board or shelf, on which were kept books and a telephone.

Asch and Miss Engdahl were at their desks when Feder entered the suite on the morning of the occurrence. Both testified as to his being in a happy and normal state of mind. Asch further testified that he saw Feder hang up his coat and hat in a closet in the outer office and then enter his private room, closing the door thereof, and that that was the last time he saw him alive; that he (Asch) finished writing a letter on which he was engaged and in a few minutes went out of the office to mail it and in about three minutes returned; that before he went out no other person went into Feder's room and he heard no shout or noise therefrom; that shortly after his return Weinberg entered, who, after they had chatted a few minutes while waiting for Feder to return and supposing he had left the office temporarily, opened the door to his room, and not seeing him there, so fastened the door that it would remain open; that immediately thereafter (the lower half of Feder's window being open) their attention was attracted to the fact that many people were looking out the windows down into the court and they went and stood by the window,

one at each end of the radiator and shelf, looked down and saw the
of a man
body/lying below on the grating over the skylight, about even with
the fourth floor of the building; that they did not hear, or have any
thought, that the body was Feder's until so advised by Nelson, who
later came into the office, examined the window, etc. of the private
room and finally closed and locked the door thereto; and that he
(Asch) recalls the condition of the window when he looked down out
of it, and the condition of the window-shade and its cord; that the
lower sash was up as far as it could go, that the shade was about
half way down the upper sash of the window, and that the cord was
"dangling loose," yet "still fastened" into "an eyelet screwed into
the window sill," in the middle of the sill. Weinberg's testimony,
as to the condition of the window, etc., when they looked out of it,
was substantially to the same effect.

Defendant's first witness was Nelson, superintendent of the
building, who testified that on the morning of the occurrence he was
sitting in a room on the 6th floor of the building overlooking the court
that he heard a noise, looked out, saw the body of a man lying on the
screening over the skylight, went to the office of the building and
telephoned for a doctor and the police department; that before the
police arrived he ascertained that the man was dead, had assistants
cover the body, and started investigations to ascertain from where
the man had fallen; that it was not until after the police wagon had
taken the body away that it was ascertained, upon discovery of a card
in the clothes, that the body was Feder's; that he then went to Feder's
office, advised Asch and Weinberg, and carefully examined the window,
sill, outside tiling, etc., and the condition and arrangement of the
private room; that the window is "92 inches high and 58 inches wide;"

one of which was at the position and which, looking down and over the
 way, was on the ground near the building, about 100 feet from the
 the front of the building. That the body was not seen by any
 person, that the body was not seen by anyone, and
 later on the other, around the corner, etc., of the building
 from the building and looking over the corner and that he
 (Jury) recalls the position of the body when he looked down and
 at it, and the position of the window-sill and the corner that was
 lower than the top of the wall, and the corner was about
 half way down the upper part of the window, and that the body was
 "positioned" in the "wall" between the "wall" and the corner
 the window sill, in the middle of the wall. Witness's testimony,
 as to the position of the body, etc., when they looked out of it,
 was substantially as the same stated.

Witness's first statement was taken approximately at the
 building, the building was on the corner of the intersection of the
 street in a room on the 5th floor of the building overlooking the street.
 that he went to the window, looking out, and the body of a man lying on the
 underneath the window, and in the office of the building and
 telephone for a building and the police department that before the
 police arrived he ascertained that the man was dead, and immediately
 over the body, and started investigation to ascertain from whom
 the man had fallen; that it was not until after the police arrived and
 before the body was found it was ascertained, upon discovery of a mark
 in the window, that the body was "kicked" that he then went to look at
 office, looking over the building, and carefully examined the window,
 sill, outside sill, etc., and the position and movement of the
 police found that the body was in the window and it looked like

that the bottom sash was open and "up as high as it would go;" that the shade was "about half way down the upper half of the window;" that the cord for the shade was then "attached to the center of the sill into a screw-eye and hanging loose;" that outside of the sill there is tile, "sloping slightly downward about 6 or 7 inches wide;" that there were some finger marks "across" this tiling; that "it seemed there were streaks from the window sill out;" that the window is about 33 inches from the floor, and on the top of the radiator just inside of the window is a wooden shelf, "about 30 inches long, centered with the window, and about 12 inches wide;" and that "there was practically a clear distance at each end of the shelf where a man could stand and look out of the window."

Defendant's eyewitness to the occurrence was James H. Coy, sales manager for the Flanbeau Paper Co., having his private office in room 1126 in the building, on the north side of the square court, on the same floor as Feder's office. There were two windows in Coy's office facing south on the court; and it appears from his testimony and from photographs introduced in evidence that, if one be sitting or standing in his office in a particular position and looking diagonally and southeasterly out of his more easterly window, the entire window of Feder's office can be seen. Coy had a flat-top desk and he usually sat in the center of the desk facing east, but on the morning in question he says he was sitting more to the right. On direct examination he testified:

"On the morning of October 15, 1926, I looked out of the window and saw an unusual event. * * I was about to dictate. I had just summoned by secretary and was leaning back in my chair to the right of the center of my desk, and * * looking out of the window. As I sat there, my eyes wandering around the court, they happened to alight on that window (Feder's). I saw someone come from the shadows of the room quickly, very rapidly, put his left hand on the window sill and vault out. The body went down. I saw no

one else in the room * * I had no acquaintance with Feder. I subsequently learned it was Feder. * * Mr. Nelson came into my office later and I had a conversation with him."

On cross-examination he testified:

"This thing that I saw happened very quickly. * * I was thinking of the contents of the letter I was about to write. * * Before I could move the body was gone and out of sight. I got up and * * looked down from my second window and the body was down below. I did not go any place, nor telephone anybody, nor call the police, nor tell anybody about it until someone came into the office. * * The man, before he vaulted out, put his left hand on the window sill on his right side of the sill, and to his right of the window shade cord. * * He must have been an athlete. * * As he went over his knees seemed to be towards his body. * * His legs were pulled up to perhaps avoid the window sill. * * As far as I observed I do not think that any portion of the man's body, except his left hand or wrist, touched any part of the window or window sill"

Ida Melenke testified that she was employed as a stenographer

in room 1032 in the building; that at the time of the occurrence she happened to be looking out of her window, facing south in the court; that she saw the body of a man falling through the air, about 20 or 25 feet away from where she was; that she did not observe from where it started; that it was "in kind of a crouched, jumping position - head up, feet down, legs drawn up and arms clinched at side;" that she did not see the face because "it was too quick;" that she did not report the occurrence to anyone by telephone or otherwise.

After a careful review of all the evidence, a majority of this court has reached the conclusion that the trial court erred in granting defendant's motion for a directed verdict in its favor and in entering the judgment against plaintiff. It was for the jury, and not the court, to determine from all the evidence whether the insured, Harry Feder, met his death accidentally or committed suicide.

In Libby, McNeill & Libby v. Cook, 232 Ill. 206, 212, it is said: "In passing upon a motion for a peremptory instruction the

question of the preponderance of the evidence does not arise at all.

* * * When a motion for a peremptory instruction is made by the defendant, if the court is of the opinion that in case a verdict is returned for the plaintiff it must be set aside for want of any evidence in the record to sustain it, a verdict should be directed.

If the court is of the opinion that there is evidence in the record which, standing alone, is sufficient to sustain such a verdict, but that such a verdict, if returned, must be set aside because against the manifest weight of all the evidence, then the motion should be denied. * * * To hold otherwise is to deny the plaintiff the right of trial by jury." (See, also, Kinsay v. Zimmerman, 329 Ill. 78, 79.)

In Fidelity and Casualty Co. v. Weise, 132 Ill. 496, 498, it is said;

"The presumption of law is that all men are sane and possessed of the love of life; are animated by the instincts of self-preservation and the natural desire to avoid personal injuries and death. This presumption, in the absence of countervailing proof, may be sufficient within itself, to establish prima facie that death occurred otherwise than by self-destruction, and to cast upon the defendant company the burden of producing evidence on the point; * * *." In Wilkinson v.

Aetna Life Ins. Co., 240 Ill. 205, 212, it is said: "While this presumption is a rebuttable presumption and may be overcome by proof, when not rebutted by proof of the circumstances in evidence surrounding the death, such presumption, when taken with the admission that the injuries which caused death were violent and external, is sufficient to require the court to submit to the jury the question whether the injuries which caused the death of Wilkinson were accidental or self-inflicted." In the present case, plaintiff, relying upon this presumption, also introduced the evidence, as above outlined, which tended strongly to show the absence of any motive on Feder's part to

commit suicide. This evidence and said presumption, "standing alone," was sufficient to warrant the rendition of a verdict by the jury in her favor. Indeed, it is so conceded by defendant's counsel.

But, defendant's counsel contend that the rules, as announced in the Libby case, (followed in subsequent cases) do not apply where defendant introduces evidence of an affirmative defense, which is not contradicted or explained. Counsel principally rely on the case of Wallner v. Chicago Traction Co., 245 Ill. 148, 152, in which it is decided that where evidence of an affirmative defense, such as release or accord and satisfaction, is offered in a personal injury case, and such evidence is not contradicted or explained, it is proper for the trial court to direct a verdict for defendant, even though all the averments of the declaration are proved. We do not think that, under the pleadings in the present case, the defense that Feder suicided was an affirmative one. Plaintiff's declaration charged that Feder met instant death from "accidental" injuries received from a fall on to an iron barricade. To this declaration defendant pleaded the general issue, and gave notice of the special defense that Feder's death did not result from "accidental" causes but from "self-destruction." The only issue was whether his fall from the window was accidental or intentional. It must have been one or the other. The allegation in the notice of special defense that he met his death from "self destruction" is substantially the same as stating that his death did not result from "accidental" causes, and does not state any new or separate defense. In 1 Words and Phrases (1914 Ed.) p. 149, it is stated an "affirmative defense" is "a plea interposed as a basis for proving some new fact." (Citing F. V. Smith Contracting Co. v. New York, 128 N. Y. Supp. 351, 353.) In Carter v. Eighth Ward Bank, 67 N. Y. Supp. 300, 303, it is said: "Suffice it to say that what the Code calls a 'defense' in pleading,

and which we sometimes call an 'affirmative defense,' can, by the express words of the Code, consist only of new matter constituting a defense, i.e. new matter which, assuming the complaint to be true, constitutes a defense to it; from which it is obvious that a denial or denials of the complaint can be no part of such defense." In Fidelity and Casualty Co. v. Weise, it appears from the opinion of the appellate court (80 Ill. App. 499) that the action was to recover on an accident insurance policy for \$5,000; that the defendant pleaded that its liability was limited by the terms of the policy to the amount of the premium paid because the insured had "wantonly inflicted upon himself the injuries from which he died, or were inflicted upon or were received by him while insane;" that the plaintiff obtained a verdict and judgment for \$6,125; and that the appellate court, for reasons stated in the opinion, affirmed the judgment. In the course of the opinion the appellate court said (p. 511) "suicide is an affirmative defense, and must be proved by a preponderance of the evidence." The case was appealed to the Supreme Court, where the judgment of the appellate court and of the trial court were reversed and the case was remanded (132 Ill. 496). In its opinion the Supreme Court said (p. 498): "The court instructed the jury that the claim the assured committed suicide was an affirmative defense, that the law cast upon the appellant company the burden of proving it, and that it 'must prove' it by 'evidence, facts and circumstances' outweighing the evidence of plaintiff (appellee) upon the point. In this, we think the court erred." After referring to the legal presumption that all men are possessed of the love of life and have the natural desire to avoid personal injuries and death (as above quoted), the Court continues (p. 499): "If it be conceded the presumption in the case at bar was sufficient to establish, prima facie, that the

and when we sometimes call on 'affirmative evidence', we are in the
 extreme sense of the word, limited only to one subject, something
 a witness, i.e. one better placed, knowing the language to be true,
 considered a witness in its own right it is evident that a witness
 on behalf of the evidence can be a part of such evidence, in
 itself and in itself. It is clear that the opinion of
 the evidence must be the only one that the witness can be placed
 on no evidence whatever for it is only that the witness should
 that the evidence was limited by the fact of the witness to the amount
 of the evidence with between the witness and 'evidence' which upon
 itself the witness then seems to be, or was called upon to
 not limited by his own power, that the witness should be
 various and various (p. 111) and that the evidence must, for
 reasons stated in the opinion, affirm the evidence. In the course
 of the opinion the evidence must (p. 111) be limited to an
 affirmative evidence, and may be proved by a representation of the
 evidence. The law was applied in the various cases, where the
 judgment of the evidence must and of the fact that the witness
 was the case was decided (p. 111, 112). In the opinion the
 evidence must (p. 111) be the only evidence that may be
 the same the same evidence must be an affirmative evidence,
 that the law upon the evidence must be the only of proving
 it, and that it 'must prove' is an 'evidence', facts and circumstances,
 including the evidence of plaintiff (affirm) upon the fact. In
 this, we think the law is true. This is the law for the legal con-
 sideration that all the evidence of the fact of the law and that the
 evidence must be the only evidence that may be the only evidence,
 the law evidence (p. 111) is the evidence the evidence in
 the fact of the law is evidence, in the fact, the law

deceased came to his death by accident, still it was competent for the appellant company, under its plea of the general issue, to combat this point and introduce any testimony which tended to show the death of the assured was not the result of accidental causes, and it was entitled to the benefit of any and all testimony produced on behalf of the plaintiff which had the like tendency. There was testimony having weight in favor of and against the position of the plaintiff (appellee) that death occurred by accident. The plaintiff was entitled to the benefit of the presumption the assured did not take his own life. The presumption was not conclusive but rebuttable. The question to be determined by the jury, from the consideration of all the evidence, (the plaintiff being given the benefit of the presumption referred to) was, at the close of the testimony as it was at the beginning, did the assured come to his death through accidental means. The appellee asserted the affirmative of this proposition, and it was indispensable to her right to recover under her declaration her position should be supported by a preponderance of the evidence. * * The instruction incorrectly cast the onus probandi upon the appellant."

Counsel for defendant, placing great reliance upon the testimony of defendant's principal witness, Coy, practically contend that Coy's testimony is conclusive of the fact that Feder committed suicide by vaulting out of the window. But it is well settled that ^{weight and} the credibility of Coy's testimony, as well as that of any other witness in the case, were for the jury and not for the court. (Village of Des Plaines v. Winkelman, 370 Ill. 149, 158; Supreme Test of E. of M. v. Stensland, 185 Ill. App. 267, 271.) The court could not properly assume, upon the hearing of defendant's motion for a directed verdict in its favor, that Coy's testimony was true, because not contradicted

and which we sometimes call an "affirmative defense," some of the
 positive results of the law, namely, of our system, notwithstanding
 a system, i.e., our positive results, showing the complaint to be true,
 considered a defense to the fact that it is positive that a complaint
 or failure of the complaint may be an act of such defense, in
affirmative defense to the fact that it is positive that a complaint
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that, we think the fact is true. This is true in the fact that
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 the fact is true and negative (i.e., that the complaint is true, i.e., that

deceased came to his death by accident, still it was competent for the appellant company, under its plea of the general issue, to combat this point and introduce any testimony which tended to show the death of the assured was not the result of accidental causes, and it was entitled to the benefit of any and all testimony produced on behalf of the plaintiff which had the like tendency. There was testimony having weight in favor of and against the position of the plaintiff (appellee) that death occurred by accident. The plaintiff was entitled to the benefit of the presumption the assured did not take his own life. The presumption was not conclusive but rebuttable. The question to be determined by the jury, from the consideration of all the evidence, (the plaintiff being given the benefit of the presumption referred to) was, at the close of the testimony as it was at the beginning, did the assured come to his death through accidental means. The appellee asserted the affirmative of this proposition, and it was indispensable to her right to recover under her declaration her position should be supported by a preponderance of the evidence. * * The instruction incorrectly cast the onus probandi upon the appellant."

Counsel for defendant, placing great reliance upon the testimony of defendant's principal witness, Coy, practically contend that Coy's testimony is conclusive of the fact that Feder committed suicide by vaulting out of the window. But it is well settled that ^{weight and} the credibility of Coy's testimony, as well as that of any other witness in the case, were for the jury and not for the court. (Village of Des Plaines v. Winkelman, 370 Ill. 149, 158; Supreme Court of E. of E. v. Stensland, 105 Ill. App. 267, 271.) The court could not properly assume, upon the hearing of defendant's motion for a directed verdict in its favor, that Coy's testimony was true, because not contradicted

by the direct testimony of another witness. (Kennedy v. Modern Woodmen, 243 Ill. 560, 568.) We are not unaware of the rule, as stated in Larson v. Glog, 235 Ill. 584, that "where the testimony of a witness is uncontradicted, either by positive testimony or by circumstances, either intrinsic or extrinsic, and the witness is not impeached, the testimony cannot be rejected even by a jury." But in the present case we think there are circumstances to be taken into consideration as bearing upon the ^{weight and} credibility of Coy's testimony. - viz: his almost instantaneous view of the occurrence before Feder's body left the window and fell out of sight, the fact that one half of the width of the window was 39 inches, the fact that the shade-cord was fastened to an eyelet in the center of the window-sill, which cord and eyelet were found undisturbed immediately following the occurrence, the fact that there were finger marks across the slightly sloping tiling just outside the sill, - all tending to throw doubt upon the correctness of Coy's testimony that Feder vaulted out of the window by first placing his left hand on the sill to the north of said eyelet and cord, or on his right half of the sill. In Podolski v. Stone, 186 Ill. 540, 547, the Court quotes with approval the language used in an opinion in Anderson v. Miljengren, 52 N. W. Rep. 219, where it is said: "But a witness may be contradicted by the facts he states as completely as by direct adverse testimony. A court or jury is not bound to accept it as true merely because there is no direct testimony contradicting it, where it contains such inherent improbabilities or contradictions which alone, or in connection with other circumstances in evidence, satisfy them of its falsity." (See, also, Quock Ting v. United States, 140 U. S. 417, 420.) Counsel argue that because of the width of the window sill, the width of the shelf on top of the radiator which was inside of the sill, and other physical conditions inside the

by the direct testimony of another witness. [REDACTED] v. [REDACTED]
[REDACTED], 100 Ill. 2d 100, 101. "We are not concerned of the value, as
stated in Winters v. Winters, 100 Ill. 2d 100, 101, "where the testimony
of a witness is uncorroborated, either by positive testimony or by
circumstances, direct testimony of witnesses, and the witness is not
impeached, and testimony cannot be rejected even by a jury." But
in the present case we think there are circumstances to be taken
into consideration as bearing upon the ^{weight and} credibility of [REDACTED]'s testimony. -
First, his almost instantaneous view of the occurrence before [REDACTED]'s
body fell the witness and fell out of sight, the fact that one-half
of the width of the street was a corner, the fact that the street-curve
was tapered to an angle in the center of the street - all, which
told him what was taking place. Circumstances immediately following the
occurrence, the fact that there were other witnesses, the fact that the witness
stating that fact related the fact, - all bearing on the weight
upon the correctness of [REDACTED]'s testimony and what resulted out of the
action by that person the fact that on the fall to the north of said
witness was that, or on the right side of the fall. In Winters v.
Winters, 100 Ill. 2d 100, 101, the court stated with approval the language
used in an opinion in Winters v. Winters, 100 Ill. 2d 100, 101, where
it is said: "When a witness may be contradicted by the facts he states
as completely as by direct evidence testimony, a court is free to
found its weight is as true nearly because there is no direct testimony
corroborating it, there is evidence which renders improbable or
improbable which witness, or in connection with other circumstances
in evidence, entirely from the weight." [REDACTED] v. [REDACTED]
Winters v. Winters, 100 Ill. 2d 100, 101. [REDACTED] stated that because of the
fact of the witness fall, the fact of the fall on top of the building
which was inside of the fall, and about physical position inside the

window, it would practically be impossible for Feder to have accidentally fallen out of the window. And counsel further argue that the place where Feder's body was picked up, according to Nelson's testimony, indicates strongly that he could not have accidentally fallen out of the window. Nelson testified to the effect that, when he first saw the body, it was lying (as afterwards ascertained) "about 10 feet north" of the point where the end of a plumb line dropped from the middle of the window of Feder's room would fall (i.e. at a point a little to the right of directly underneath a person looking down from the window), and also was lying "about 12 feet away from the perpendicular building line." But Nelson's testimony is partially contradicted by that of each who stated that, when he and Weinberg were looking down from the window and saw the body of a man lying on the grating over the skylight, he noticed that it was not directly beneath the window but a little "to the left" (i.e. to the south). Notwithstanding counsels' contentions and arguments, a majority of this court is of the opinion that, under all of the evidence and the law of this state, it was for the jury, and not the trial court, to say whether Feder accidentally fell out of the window or intentionally vaulted or jumped out of it.

For the reasons indicated the judgment of the circuit court is reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan, J., concurs.
Barnes, J., dissents.

[illegible]

1940-1941, 1942-1943, 1944-1945, 1946-1947, 1948-1949, 1950-1951, 1952-1953, 1954-1955, 1956-1957, 1958-1959, 1960-1961, 1962-1963, 1964-1965, 1966-1967, 1968-1969, 1970-1971, 1972-1973, 1974-1975, 1976-1977, 1978-1979, 1980-1981, 1982-1983, 1984-1985, 1986-1987, 1988-1989, 1990-1991, 1992-1993, 1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 2420-2421, 2422-2423, 2424-2425, 2426-2427, 2428-2429, 2430-2431, 2432-2433, 2434-2435, 2436-2437, 2438-2439, 2440-2441, 2442-2443, 2444-2445, 2446-2447, 2448-2449, 2450-2451, 2452-2453, 2454-2455, 2456-2457, 2458-2459, 2460-2461, 2462-2463, 2464-2465, 2466-2467, 2468-2469, 2470-2471, 2472-2473, 2474-2475, 2476-2477, 2478-2479, 2480-2481, 2482-2483, 2484-2485, 2486-2487, 2488-2489, 2490-2491, 2492-2493, 2494-2495, 2496-2497, 2498-2499, 2500-2501, 2502-2503, 2504-2505, 2506-2507, 2508-2509, 2510-2511, 2512-2513, 2514-2515, 2516-2517, 2518-2519, 2520-2521, 2522-2523, 2524-2525, 2526-2527, 2528-2529, 2530-2531, 2532-2533, 2534-2535, 2536-2537, 2538-2539, 2540-2541, 2542-2543, 2544-2545, 2546-2547, 2548-2549, 2550-2551, 2552-2553, 2554-2555, 2556-2557, 2558-2559, 2560-2561, 2562-2563, 2564-2565, 2566-2567, 2568-2569, 2570-2571, 2572-2573, 2574-2575, 2576-2577, 2578-2579, 2580-2581, 2582-2583, 2584-2585, 2586-2587, 2588-2589, 2590-2591, 2592-2593, 2594-2595, 2596-2597, 2598-2599, 2600-2601, 2602-2603, 2604-2605, 2606-2607, 2608-2609, 2610-2611, 2612-2613, 2614-2615, 2616-2617, 2618-2619, 2620-2621, 2622-2623, 2624-2625, 2626-2627, 2628-2629, 2630-2631, 2632-2633, 2634-2635, 2636-2637, 2638-2639, 2640-2641, 2642-2643, 2644-2645, 2646-2647, 2648-2649, 2650-2651, 2652-2653, 2654-2655, 2656-2657, 2658-2659, 2660-2661, 2662-2663, 2664-2665, 2666-2667, 2668-2669, 2670-2671, 2672-2673, 2674-2675, 2676-2677, 2678-2679, 2680-2681, 2682-2683, 26

MR. JUSTICE BARNES LIVINGING.

I think the court properly directed a verdict. There was no fact in dispute. To be sure, plaintiff introduced evidence to establish a prima facie case, but one that becomes so only by presumption of law in the absence of any proof of the physical circumstances themselves from which the real fact of either accident or suicide must be determined. But such presumption is rebuttable. When the circumstances of the death unmistakably establish the contrary, it no longer has any force. Unless it is supported by evidence of physical facts that have a tendency to refute those relied upon to show suicide there is then no question of fact left for the jury to determine. The presumption disappears.

Plaintiff, relying wholly on the presumption of law, introduced no evidence of the circumstances under which the body of the deceased went out of the window. The only evidence of those facts was introduced by defendant and there was no attempt to refute or contradict them. From them one conclusion only is possible. They affirmatively establish a suicide and there is nothing inherently improbable in the evidence of them.

Not only was there testimony by one eyewitness that the deceased vaulted from the window, and by another eyewitness that the body fell in a position indicating a leap and not a headlong fall, but the body was found to be twelve feet from the building at a place directly opposite a point in the wall ten feet from the middle of the window from which the body fell, thus establishing as an inevitable fact that the body left the window by propulsive

force. None was accounted for excepting by defendant's leap. Such a state of facts completely excludes the theory of an accidental fall while standing near the window, - the only alternative theory of which the circumstances in evidence would possibly admit. It is also inconsistent with the laws of nature that a person five feet nine inches tall should, from mere loss of balance, without any propulsive force, while standing at a window thirty-three inches from the floor, fall out of it over a shelf at that height twelve inches wide, and a farther extension of about eight inches of wall. The center of gravity would not admit of such an accident. Even if he stood nearer the window at the end of the radiator the same conclusion would be obvious. However, there was no proof that defendant stood or was placed in any position whereby he could have accidentally fallen from the window. And if he had so fallen - unless he undertook to stand on the window ledge, a theory not supported by any evidence - he would have gone out of the window head first and not feet first, as shown by the undisputed proof, and the body could not in any event have been carried in its descent to the place it landed without propulsive force, and none is accounted for in the theory of an accident.

Neither these physical facts nor the credibility of the witnesses is in anywise brought in question by anything in the record. Nor is the evidence on which the prima facie case rests incompatible with the undisputed physical facts. They rendered the conclusion of suicide irresistible and left no alternative theory of fact for submission to the jury. A directed verdict, therefore, in no wise conflicted with the principles on which the authorities cited in the opinion are founded.

large. There was no evidence for suggesting by testimony that

such a state of mind was actually suggested by the theory of an

accidental fall while standing near the window - and only

alternative theory at which the circumstances in evidence would

possibly admit. It is also inconsistent with the fact of having

that a person like that who would fall should, from some cause

of balance, without any perceptible cause, while standing at a

window looking out from the front, fall out of it with

a fall as great as that which would result from a fall from

of about eight inches or less. The theory of gravity would not

admit of such an accident. Even if he stood under the window of

the end of the building the same conclusion would be reached.

However, there was no proof that defendant stood at any place in

any position except as shown from the evidence taken from the

window, and it is not to be said - unless he happened to stand

on the window ledge, a theory not suggested by any evidence - he

would have been out of the window long time and not that time

as shown by the undisputed facts, and the body could not be any

other than what would be the result in the place it landed.

Without exception, there, and more is suggested for in the theory

of an accident.

There is no evidence that the possibility of the

existence of an accident is suggested by the evidence in the

record. But in the evidence as shown the possibility of such

inconceivable and the only possible cause. That evidence

the conclusion of which is reached and that an alternative theory

is not suggested by the evidence as shown the evidence

is not suggested by the evidence as shown the evidence

is not suggested by the evidence as shown.

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250 I.A. 645⁴

SALIE FEIER,
Plaintiff in Error,

v.

UNION INDEMNITY COMPANY,
Defendant in Error.

ERROR TO CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BRIDLEY DELIVERED THE OPINION OF THE COURT.

On September 23, 1926, the defendant company issued an insurance policy to Harry Feder, wherein it promised to pay \$30,000 to plaintiff (wife of assured) as beneficiary, in the event that he should sustain bodily injuries, caused directly and solely by accidental means and which should result in immediate death. It contained a provision that "this insurance does not cover suicide or any attempt thereat, sane or insane." On the morning of October 16, 1926, the assured either accidentally fell from, or intentionally jumped out of, the window of his private business office on the 11th floor of the Conway Building, Chicago, on to an iron screen above a skylight in the interior court of the building, and was instantly killed. On February 8, 1927, plaintiff brought suit upon the policy, and alleged, inter alia, in her amended declaration that on the day mentioned the assured met instant death from accidental injuries received by him from a fall upon an iron barricade. To this declaration defendant filed a plea of the general issue and gave notice of special defenses, one of which as stated was that the assured did not receive bodily injuries, or come to his death, by accidental means. A trial was had in January, 1928, and it was conceded by

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W. J. ...
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defendant that the policy (introduced in evidence) was in full force and effect at the time the assured met his death and that due notice and proof of death had been given. Plaintiff contended that the assured's death was the result of accident, solely and independently of all other causes, and defendant contended that he had committed suicide. Plaintiff was a witness in her own behalf and she called five other witnesses. She also introduced without objection certain photographs, some showing the interior court of the building and certain windows, and others showing the interior arrangement of Feder's office, etc. At the conclusion of her case the court denied defendant's motion for a directed verdict in its favor. Defendant called five witnesses and all were examined and cross-examined. Plaintiff did not introduce any further evidence in rebuttal. At the conclusion of all the evidence, on defendant's motion, the court instructed the jury to return a verdict finding the issues in its favor, and a judgment for costs was entered against plaintiff. She seeks by this writ of error to reverse the judgment.

The sole question for our determination is, whether the court at the close of all the evidence erred in peremptorily instructing the jury to return a verdict in defendant's favor and in entering the judgment. After reviewing the evidence, a majority of this court has reached the same conclusion as in the case of Feder v. New York Life Insurance Co. (No. 32,777, opinion this day filed), in which the same question was involved, pertaining to the same occurrence, on somewhat similar policies, and in which the evidence was substantially the same. It was there held in substance that under the evidence and the law the court erred in giving such a peremptory instruction for the defendant at the close of all the evidence. For the reasons stated in that opinion the judgment in the present cause is reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan, J., concurs.
Barnes, J., dissents.

determine that the policy [insurance] was in fact
 issued and effected at the time the accident occurred and that
 the policy was issued at the time the accident occurred. [Initially, evidence
 that the accident occurred was the result of a witness, solely, and
 independent of all other evidence, and independent evidence that
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 the issue in the fact, and a judgment for the plaintiff against
 defendant. The issue of fact was in favor of the plaintiff.
 The other question was one of negligence, whether the
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 somewhat similar points, and in which the evidence was substantially
 the same. It was found that in defendant's case, the evidence
 was the fact in return a verdict in defendant's favor and in finding the
 judgment in favor of the plaintiff. The issue of fact was in favor of the plaintiff.
 and the same result.

32875

MORRIS SCHWARTZ and LENA SCHWARTZ,
Appellees,

v.

UNITED STATES FIDELITY & GUARANTY
CO.,
Appellant.

7063
250 I.A. 646

APPEAL FROM MUNICIPAL
COURT OF OHIO CO.

MR. PRESIDING JUSTICE GAILLEY DELIVERED THE OPINION OF THE COURT.

In a fourth class contract action, tried without a jury and based upon paragraph 4 of a "Fraud Bond" issued by defendant for the period of one year from November 1, 1927, there was a finding and judgment against defendant in the sum of \$134, and this appeal followed. Plaintiffs (appellees) have not entered their appearance or filed a brief in this court.

By said paragraph of the bond defendant agreed during said period to indemnify plaintiffs, who were engaged in conducting a restaurant business in Chicago, at No. 2123 West Division street (referred to in the bond as the "premises"),

"Against loss or losses, not exceeding \$300 in the aggregate, of money or personal property, including merchandise, of the obligee (plaintiffs), through robbery or holdup, accompanied by violence or threat of violence, of the obligee, or any of the obligee's employees, when transporting such money or property of the obligee to or from said premises within ten (10) miles thereof."

In their statement of claim plaintiffs alleged that on February 19, 1928, Morris Schwartz, while having in his possession the sum of \$134 (being the proceeds of receipts of said restaurant business), and while transporting such money to and from said premises within ten miles thereof, was held up by an individual,

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TABLE 1. Mean values of the variables measured in the 1000 m and 2000 m races

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1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.

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armed with a dangerous weapon, who violently and by force took said sum of money from said Schwartz; and that, by reason thereof, defendant became obligated to indemnify plaintiffs in said sum under the terms of the bond, but has failed and refused so to do.

In its affidavit of merits defendant, while admitting the execution of the bond and that it was in force on February 19, 1928, denied that plaintiffs on that day had suffered the loss of \$134, or of any other sum, through robbery accompanied by violence, while transporting money to or from said premises, as charged.

Plaintiffs' only witness was Morris Schwartz. At the conclusion of his testimony defendant moved for a directed verdict in its favor but the motion was denied. Defendant did not introduce any evidence and, thereupon, the court entered the finding and judgment as stated.

From Schwartz's testimony it does not appear that, on the night he claimed he was robbed, he was engaged in "transporting" any money or property of the plaintiffs to or from the premises, or in connection with plaintiffs' restaurant business. His testimony was to the effect that after closing the restaurant, about 10 or 10:30 o'clock p. m., he went to the Humboldt Coffee Shop, a short distance away on the same street, "just to enjoy myself for the rest of the evening;" that said shop is a place where coffee and sandwiches are served and patrons play "pinochle and other card games;" that after watching others play cards for a considerable time he left to go to his home; and that while on his way home the claimed robbery occurred. He does not think that, under the terms of the bond, he is entitled to recover of defendant the amount of his loss, as claimed. The judgment must be reversed, with a finding of fact.

REVERSED WITH FINDING OF FACT.

Scanlan and Barnes, JJ., concur.

armed with a dangerous weapon, and violently and by force took said

him of nearly five hundred dollars and took, by force thereof,

defendant was not satisfied as defendant's claim to said sum

under the terms of the bond, and was failed and refused to do.

In the activities of service defendant, while claiming the

execution of the bond and that it was in force on February 18, 1928,

defendant said plaintiff on that day had delivered the sum of \$100, or

of any other sum, which was subsequently acknowledged by plaintiff, while

transferring same to the bank and plaintiff, as charged.

Plaintiff, who alleged was a party defendant, at the

conclusion of his testimony defendant moved for a directed verdict

in the favor of the moving party. Defendant did not introduce

any evidence and, therefore, the court refused the motion and

judgment was entered.

From defendant's testimony it does not appear that, on

the night he claimed he was robbed, he was engaged in "transferring"

any money or property of the plaintiff, as he claims the proceeds

of the transaction with plaintiff, defendant testimony. His testimony

was to the effect that after leaving the restaurant, about 11 at

night, about 11 p. m., he went to the hotel where they, a short

distance away to his home, that is, to his apartment for the

rest of the evening. This was about 11 at night and after and

remained there until about 11 p. m. and then he left and

remained there until about 11 p. m. and then he left and

also he said to go to his home and that while on his way home the

claimant testified accordingly. As he said that, under the terms of

the bond, he is entitled to recover of defendant the amount of his

loss, as claimed. The judgment must be reversed with a finding of

fact.

Reversed with finding of fact.

Reversed and Remanded, 11, 1928.

32875

FINDING OF FACT.

We find as an ultimate fact that on the night of the claimed robbery Morris Schwartz was not engaged in transporting any money of the plaintiffs to or from the premises where their restaurant business was conducted.

1888

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32752

HARRY T. VINNEDGE et al.,
Complainants,

v.

MYSTIC WORKERS OF THE WORLD
et al.,
Defendants.

MYSTIC WORKERS OF THE WORLD,
(cross-complainant),
Appellant,

v.

HARRY T. VINNEDGE et al.,
(cross-defendants),
Appellees.

7004a
250 I.A. 646

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order dismissing the cross-bill of complaint herein.

The original bill was filed January 28, 1927, and answered March 11, 1927, by cross-complainant and other defendants. On April 26, 1927, cross-complainant filed its cross-bill, and a temporary injunction prayed for therein was granted May 10, 1927. On the same day the court dissolved a temporary injunction entered February 2, 1927, on the bill. On August 5, 1927, the cross-bill was taken as confessed against complainants in the original bill, the order reciting that they had failed to comply with the rule on them entered May 31, 1927, to plead to the cross-bill, and that they were in default for failure to except, demur, plead or answer to the cross-bill. On the same day the cross-bill was taken as confessed against certain of the other co-cross-defendants (who were not

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THE ORIGINAL WILL WAS FILED JANUARY 25, 1937, AND ANSWERS
WERE FILED 11, 1937, BY ATTORNEYS-AT-LAW AND OTHER PERSONS. ON APRIL
25, 1937, ATTORNEYS-AT-LAW FILED THE CROSS-BILL, AND A SUBSEQUENT
OBJECTION WAS MADE FOR OBJECTION WAS MADE MAY 12, 1937. ON THE SAME
DAY THE COURT GRANTED A SUBPOENA FOR OBJECTION MADE FEBRUARY 2,
1937, ON THE BILL. ON APRIL 5, 1937, THE CROSS-BILL WAS GRANTED AS
AMENDED AGAINST RESPONDENTS IN THE ORIGINAL BILL. THE COURT
FINDING THAT THEY HAD FAILED TO COMPLY WITH THE RULE ON THAT MATTER
MAY 11, 1937, IS GRANTED AS THE CROSS-BILL, AND THAT THEY WERE IN
VIOLATION FOR FAILURE TO COMPLY, COURT, GRANT AS AMENDED IN THE CROSS-
BILL. ON THE SAME DAY THE CROSS-BILL WAS GRANTED AS AMENDED
WITHOUT OBJECTION OF THE OTHER RESPONDENTS (AND WERE NOT

parties to the original bill) who were served with summons to the previous June term and were defaulted for failure to except, demur, plead or answer to the cross-bill.

On August 18, 1927, the complainants in the original bill filed their so-called "special appearance" and a motion for the alleged purposes of dissolving the injunction entered under the cross-bill and dismissing the cross-bill on the grounds that it was not germane to the original bill, that the cross-defendants other than the original complainants were not parties to the original bill, and that the relief sought in the cross-bill was not remotely or indirectly involved in the relief sought in the original bill. On the same day a like "special appearance" and motion for the same purposes was filed by all of the cross-defendants other than those who were complainants in the original bill.

These motions do not appear to have been brought before the court for consideration until April 6, 1928, when the order appealed from was entered dismissing the cross-bill as not germane to the original bill.

In the view we take of the record it is unnecessary to set forth or discuss the issues raised by either the original bill or the cross-bill. The simple question presented is whether the court was warranted in dismissing the cross-bill upon said special appearances and motions.

As said in L. & F. R. R. Co. v. Industrial Board, 232 Ill. 136, 141: "A special appearance must be for the purpose of urging jurisdictional objections, only, and it must be confined to a denial of jurisdiction. An appearance for any other purpose than to question the jurisdiction of the court is general. (Nicholes v.

passed to the original bill, who were subject with reference to the
 previous laws and were satisfied for future as regards, namely,
 passed or passed to the same bill.

On August 12, 1897, the amendments in the original bill

that their "special agreement" and a motion for the
 alleged purpose of dissolving the injunction against the
 cross-bill and dissolving the cross-bill as the grounds that it was
 not relevant to the original bill, that the same-determining order
 from the original amendments were not passed to the original

bill, and that the relief sought in the cross-bill was not necessary or
 directly
 involved in the relief sought in the original bill. On the same

day a live "special agreement" was entered for the same purpose
 was filed by all of the cross-complainants against those who were
 complainants in the original bill.

These motions as not agreed to have been returned before

the court for consideration until July 1, 1898, when the order
 specifying time was entered dissolving the cross-bill as not relevant
 to the original bill.

In the view of the court it is unnecessary to
 set forth or discuss the reasons relied by either the original bill
 or the cross-bill. The simple question presented is whether the
 order was necessary as dissolving the cross-bill upon said special
 agreement and motion.

It was in U. S. v. International Harb. Co., 151 U.S. 101,
 102, 103, "a special agreement was made for the purpose of making
 technical objections only, and it was so treated as a denial
 of jurisdiction. It is not for the purpose of making

question the jurisdiction of the court to render. Id. 103-104.

People, 165 Ill. 502; Franklin Life Ins. Co. v. Hickson, 197 id. 117.)"

It is clear that said so-called special appearances presented no jurisdictional objection. The cross-bill was dismissed solely on the ground that it was not germane to the original bill. Of course that was not a jurisdictional question, and the proper time to raise it by those cross-defendants of whom the court had acquired jurisdiction was before the cross-bill was taken as confessed. Thereafter the proper procedure for them was first to ask that the order defaulting them be vacated if there was any good reason therefor. But they could not re-enter the case by special appearance and have the bill, which had been duly taken as confessed against them, dismissed on non-jurisdictional grounds.

As to the other cross-defendants who joined in said special appearance with these not parties to the original bill, it does not appear that the court had previously acquired jurisdiction of them. But whatever may be their status in the case from entering an appearance that raised no jurisdictional question, they were no more entitled to raise under a special appearance the question whether the cross-bill was germane to the original bill than the other cross-defendants. The limitations of a special appearance precluded any of them from entering it for that purpose, and hence the cross-bill was wrongfully dismissed.

Whether the cross-bill is germane to the original bill is not before us for consideration. Nor are the merits of either bill brought before us on this appeal.

Appellees state that as a matter of fact the bill was argued and dismissed on the theory that a by-law of cross-complainant,

which its cross-bill sought to enforce, was invalid and void. They cannot be heard to dispute the order, which, as to the ground for dismissal speaks for itself, and expressly states as the ground therefor that the cross-bill is not germane to the original bill.

The order dismissing the cross-bill will, therefore, be reversed.

REVERSED.

Gridley, P. J., and Scanlan, J., concur.

which the green-ill might be confused, was *imbricatus* and *viridis*. They cannot be taken to indicate the species, since, as in the present case, the green-ill might be confused with *imbricatus* and *viridis*. Therefore, the green-ill is not known as the original ill. The same, however, the green-ill will, therefore, be

referred.

1870-1871

Vol. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

32787

GORDON A. RAMSAY,
administrator, etc.,
Appellee.

v.

CITY OF CHICAGO,
Appellant.

7005a
250 I.A. 646

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment entered on a verdict for \$5,000 in a suit brought under the Injuries Act to recover damages for wrongfully causing the death of one William H. Berdan.

The declaration is in two counts. The first count charges negligence in the maintenance of a street pavement. The second count is predicated on the failure and neglect of the City of Chicago to construct and provide a barricade, fence or other protection against running off the highway into a deep ditch along its side.

The accident occurred on Lincoln avenue, Chicago, which runs in a northwesterly direction towards Miles Center, before dark in the evening of July 26, 1919, about 200 feet northwesterly from where said avenue crosses a canal. Between the bridge at the crossing and the place of the accident, and for about three-fourths of a mile, the paved part of the street, which covered about 15 or 20 feet of its width, was full of holes of various sizes so that in some places, as testified to and as indicated by the course of travel on the street itself, the vehicles went in a zigzag course to avoid the holes, particularly so at the point of the accident. There the course of

7002
25014.048

ADULT PROTECTIVE SOCIETY
CITY OF CHICAGO

REPORT
JAMES A. HANCOCK
ADMINISTRATOR
CITY OF CHICAGO
APPROPRIATE

MR. JUSTICE WILLIAM O. DOUGLAS
U.S. SUPREME COURT

This report is from a judgment entered on a verdict for \$2,000 in a civil action against the defendant and is received for the purpose of being filed in the case of Mr. William O. Douglas.

The defendant is in the county. The first count charges negligence in the maintenance of a street pavement. The second count is charged on the failure and neglect of the city of Chicago to construct and provide a drainage, which is alleged to have caused the plaintiff to be injured. The third count is charged on the failure of the defendant to take proper precautions against flooding of the highway into a deep ditch along the side.

The accident occurred on March 12, 1934, when there was a northwesterly gale blowing towards Illinois Street. The plaintiff was driving on the highway at the time of the accident. The first of the accident, and the second, was the plaintiff's failure to take proper precautions against flooding of the highway into a deep ditch along the side. The third count is charged on the failure of the defendant to take proper precautions against flooding of the highway into a deep ditch along the side. The fourth count is charged on the failure of the defendant to take proper precautions against flooding of the highway into a deep ditch along the side. The fifth count is charged on the failure of the defendant to take proper precautions against flooding of the highway into a deep ditch along the side. The sixth count is charged on the failure of the defendant to take proper precautions against flooding of the highway into a deep ditch along the side. The seventh count is charged on the failure of the defendant to take proper precautions against flooding of the highway into a deep ditch along the side. The eighth count is charged on the failure of the defendant to take proper precautions against flooding of the highway into a deep ditch along the side. The ninth count is charged on the failure of the defendant to take proper precautions against flooding of the highway into a deep ditch along the side. The tenth count is charged on the failure of the defendant to take proper precautions against flooding of the highway into a deep ditch along the side.

travel towards Miles Center veered to the left side of the pavement to avoid some large holes on and extending from its right side to or past the center of the street which, according to the evidence, were between two and five feet in length or width and from an inch and a half to three inches in depth. There were also smaller holes on the left side of the street over which the car bumped as Berdan steered it to the left to avoid these larger holes. In so doing the left wheels of his car ran for some ways in the soft dirt and weeds along its edge, and then into the ditch in question. The ditch was from five to eight feet deep, and sloped almost abruptly from near the edge of the pavement, most of the witnesses fixing it at a few inches^{therefrom}. It was uncontradicted that the ditch was filled with weeds that grew up close to the pavement to the height of five or six feet so that the ditch was obscured from the vision of those driving along the road.

Plaintiff's witness to the accident and the manner of driving the car was a young woman who was sitting on the seat between Berdan and another man. The car went down into the ditch and turned over. Berdan was taken to the hospital in an unconscious condition and died the same night. Up to that time he had been in perfect health. This young woman and a man, who was at the bridge and testified for defendant, were the only eyewitnesses of the accident. The other occupant of the car was dead at the time of the trial.

It is urged that the verdict and judgment are against the manifest weight of the evidence. In this contention we cannot concur. So far as it bears on the question of negligence it shows that the street had been in the condition described for over a year, of which the city had due notice, and tended to show that the ditch constituted

a hidden danger contiguous to the street and that in an effort to avoid the hummocks and holes in the street the car left or was thrown off the pavement so that its left wheels ran on the soft dirt and unseen slope along the side thereof, thus causing the car to get beyond the control of the driver and to veer off into the ditch. While there was contradictory evidence as to the speed the car was driven, plaintiff's witness saying about 18 to 20 miles an hour, and defendant's witness, between 45 and 50 miles an hour, it left the question of fact and the credibility of the witnesses for the jury to determine. If the jury believed plaintiff's witness we cannot say that the testimony as to speed or manner of driving indicated a want of ordinary care or constituted negligence under the circumstances.

It was also a question for the jury to say whether or not it was negligence for the city under such circumstances not to construct a barrier or fence that would prevent vehicles from going into a ditch of that character which came close to the pavement and was obscured from the sight of users of the street by a high growth of weeds.

It is also urged in the absence of direct proof that plaintiff's intestate was in the exercise of ordinary care or that his death was caused by the injuries he then received, the court should have allowed defendant's motion for a directed verdict of not guilty. We think the testimony of the passenger in the car as to the decedent's manner of driving tended to show the exercise of ordinary care, and the fact that the decedent, who was in perfect health up to that time and was taken in an unconscious state from there to a hospital and died the same night, supports a reasonable inference that his death resulted from the accident.

a hidden danger consisting in the fact that in the event of
avoid the possibility of being in the event of the war to be
there off the government as that the fact would be to the war
also had much more than the fact itself, then meaning the
and to get beyond the control of the river and to keep all into
the fact. While there are contradictory evidence as to the speed
the war and river, the fact is a general feeling about 12 to 15
miles an hour, and the fact is a general feeling about 12 to 15
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under the circumstances.

It was also a general feeling about 12 to 15 miles an hour
and it was a general feeling about 12 to 15 miles an hour
is considered a factor of fact about 12 to 15 miles an hour
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It is also stated in the evidence of fact about 12 to 15
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as to the fact of fact about 12 to 15 miles an hour
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fact of fact about 12 to 15 miles an hour

Complaint is made of a peremptory instruction to find defendant guilty if the jury believed from a preponderance of the evidence that said Bordan lost his life by and through the wrongful act, negligence and default of defendant "as charged in the declaration," etc. The basis of this contention is that the instruction must be considered as if it copied the averments of each count of the declaration concerning the negligence alleged, and that the second count in charging that it was the duty of defendant to construct, keep and maintain a fence or barricade along said roadbed to keep automobiles from running off the driveway into the ditch, imposes a greater duty upon defendant than required by law. But the pleaded facts in the second count upon which the alleged duty is predicated, stated a cause of action, in our opinion, and defendant did not demur thereto.

It is said in *Blashfields Encyclopedia of Law*, Vol. 3, p. 2181:

"A municipality is bound to provide barriers or guards where the street itself is unsafe for travel by reason of the presence or the close proximity of excavations, embankments, deep water, or other pitfalls or dangers. The duty of a municipality therefore extends to dangerous places near the traveled portion of a highway, although outside of it; the true test of the necessity of erecting barriers to make a highway safe for travelers being not whether the dangerous place to be guarded against is outside the highway or whether some small strip of ground not included in the way must be traversed in reaching the dangerous place, but whether there is such a risk of the traveler, using ordinary care in passing along the street, of being thrown or falling into the dangerous place, that a railing is a requisite to make the way itself safe and convenient. And whatever may be the width and suitability of the space actually occupied as a traveled track of a highway, there may exist defects or obstructions outside the traveled track so connected with it as to render the highway not reasonably safe for travel, as an unguarded ditch at the side of the road, which is two feet wide and almost as deep." (See also 43 *Corpus Juris*, 1036.)

This doctrine was adhered to in *City of Chicago v. Baker*, 95 Ill. App. 413, where many pertinent authorities are cited. The case was

affirmed in 195 Ill. 54. The second count, in our opinion, states a cause of action in conformity with this theory of law, and therefore the question for the jury to determine was whether the proof sustained the alleged facts upon which it was predicated. (City of Chicago v. Baker, 195 Ill. 54.) Even if, therefore, as contended, the second count may be read into the instruction that fact would not render it erroneous, predicated, as it is, on a state of facts that would render the city liable for damages.

We think the judgment should be affirmed.

AFFIRMED.

Gridley, P. J., and Kennan, J., concur.

affirmed in 1911. The second count, in my opinion, states a cause of action in conformity with the theory of law, and hence from the question for the jury no objection was raised. The court sustained the alleged facts upon which it was presented. Ill. 97 Ill. 97 v. Ill. 97. 223 Ill. 241. Even so, therefore, as contended, the second count may be read into the allegation that fact would not render it erroneous, provided, as it is, on a state of facts that would render the city liable for damages.

It is the judgment of the court to affirm.

Chicago, N. J., and Hamilton, N. J., 1911.

32819

JOHN J. JARKE, Jr.,
Appellee,

v.

GOLDMAN BOND & MORTGAGE CO.,
a corporation,
Appellant.

7006a
250 I.A. 646

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from the finding and judgment of the court for \$1212.50 against defendant in a suit brought to recover back such sum, paid by plaintiff to defendant as commissions to procure two loans to be secured by mortgage on an apartment building which plaintiff, or his wife, was about to purchase.

The statement of claim is predicated on two grounds; (1) that the loans for which plaintiff paid such sums as commissions were never consummated and accepted, and the commissions were paid upon the misrepresentation that the loans had been secured and that the money was available, and (2) that in violation of its contract of employment to serve plaintiff for compensation, defendant, without plaintiff's knowledge or consent, agreed with other parties for commissions.

In its affidavit of merits defendant admits it was employed by plaintiff as broker, and alleges that as such it made diligent efforts to obtain the loans on the terms and conditions set forth in the statement of claim, and did obtain them upon such terms - the first mortgage loan of \$125,000 from the Kaspar American State Bank,

2501.A.848

DOCKET NO. 2501.A.848
IN RE: THE ESTATE OF
JOHN J. LAMAR, JR.

JOHN J. LAMAR, JR.,
Applicant,
vs.
JAMES E. LAMAR & COMPANY, INC.,
Appellee.
Supreme Court of the State of New York
In the Southern District of New York

1. JAMES E. LAMAR & COMPANY, INC., the Appellee, moves for an order...

This is an appeal from the finding and judgment of the court for \$111,110 against the Appellant in a suit brought to recover...

been such sum, said by Plaintiff as damages and commission to provide two issues to be received by mortgage on an apartment building which Plaintiff, on his side, was about to purchase.

The statement of claim is provided on two grounds: (1)

that the issue for which Plaintiff paid each year on commission was never communicated and accepted, and the commission was paid upon the misrepresentation that the issue had been received and that the money was available, and (2) that in violation of the contract of employment to serve Plaintiff for commission, defendant, without Plaintiff's knowledge or consent, agreed with other parties for commissions.

In its attempt to make defendant liable it was suggested by Plaintiff as broker, and alleged that as such it made diligent efforts to obtain new issue on the bond and commission was paid to the defendant of claim, and all claim was open and fair - the first mortgage loan of \$111,110 from the Empire Mortgage Loan Bank,

and the second mortgage loan of \$27,500 from the Realty Commercial & Finance Co., Inc.; that the money was available; that defendant was to obtain the commission on the first loan from the lender, and the sum of \$1212.50 from plaintiff as a commission for procuring said second mortgage loan.

Appellant urges that plaintiff undertook to prove a different cause of action from that set forth in the statement of claim. We do not so view the record, nor was there any question of variance raised at the trial.

The real question presented on the record is whether the court's finding is against the weight of the evidence. We are not prepared to say that it is. To some extent it turns upon the credibility of the witnesses, to determine which the court was in a much better position than we are.

We are unable to reconcile with some of the documentary evidence defendant's claim that plaintiff was not to pay it a commission upon procuring the first mortgage loan but was to pay the entire sum of \$1212.50 for obtaining the second mortgage loan.

The application for the first mortgage loan of \$125,000 was dated April 5, 1927. It made no express provision for payment of a commission to defendant. Nor does the evidence indicate any definite arrangement therefor in preliminary verbal negotiations which resulted in defendant's submission of a written proposition, dated March 10, 1927, to the Kaspar American State Bank for a loan of \$125,000 on the property in question. While the usual preliminary steps to placing such a loan were in progress, plaintiff concluded that he would require an additional amount to consummate his deal, and signed an application on May 2, 1927, for a second mortgage loan of \$27,500 which was submitted by defendant to said Realty Commercial & Finance Co.

and the second mortgage loan of \$17,500 from the Equity Mortgage Finance Co., Inc. That the money was available; that defendant was to obtain the commission on the first loan from the Equity, and the sum of \$17,500 from plaintiff as a commission for procuring said second mortgage loan.

Plaintiff argues that plaintiff undertook to prove a different cause of action from that set forth in the statement of claim. He does not set forth the record, nor does he pose any question of variance raised by the Equity.

The real question presented on the record is whether the court's finding is against the weight of the evidence. It is not proposed to say that it is. It seems rather to turn upon the credibility of the witnesses, in a matter which the court was in a much better position than we are.

It is unable to reconcile with some of the testimony

evidence defendant's claim that plaintiff was not to pay it a

commission upon procuring the first mortgage loan but was to pay the entire sum of \$17,500 for obtaining the second mortgage loan. The commission for the first mortgage loan of \$17,500

was paid April 1, 1937. It does not appear whether the payment of a commission is demanded. Yet does the evidence indicate any

definite arrangement therefor in plaintiff's verbal negotiations which resulted in defendant's commission on a written agreement.

Dated March 10, 1937, to the Equity mortgage loan for a loan of \$17,500 on the property in question. Also the record positively

shows no planing with a loan was in progress, plaintiff admitted that he would receive an additional amount to procure the loan.

and stated an application on May 1, 1937, for a second mortgage loan of \$17,500 which was submitted by defendant to said Equity Mortgage

On the same day plaintiff and his wife signed a paper drawn up on defendant's letter paper, reading as follows:

"Supplementing my application of even date covering a second mortgage in the amount of twenty-seven thousand five hundred (\$27,500.00) dollars we the undersigned agree to pay you the sum of two hundred seventy-five (\$275.00) dollars for your services rendered.

We the undersigned direct you to pay the above named sum to Goldman Bond & Mortgage Co., from the proceeds of my loan covering the premises known as," etc.

On the margin of said instrument are the following figures in plaintiff's handwriting:
$$\begin{array}{r} 937.50 \\ 275.00 \\ \hline 1212.50 \end{array}$$
 Plaintiff testified that he placed them there when figuring up the commissions in defendant's office on May 11, 1927, the day he gave defendant his check for that amount. He had gone that day to defendant's office at the request of Goldman, its treasurer, with whom the negotiations had been conducted, to pay the commissions upon the understanding and representation that the loans were accepted and consummated. Previously, on April 18, 1927, before making application for the second loan he had given defendant his note for \$937.50 for commissions, and secured the same by a mortgage on other property belonging to him, and by assigning to defendant the sum of \$937.50 "of moneys on deposit under the loan in the sum of \$125,000 if and when the same becomes payable." When he gave his check to defendant for \$1212.50, said note and mortgage were surrendered and canceled. These facts plainly support the inference and plaintiff's contention that the sum of \$937.50 was agreed upon as commissions for defendant's services in procuring the first loan before a second or additional loan was considered or proposed. In harmony therewith is the express agreement to pay \$275 as commissions for the second loan, and not the sum of \$1212.50. It was also testified to by one Herson, who acted as plaintiff's attorney in the course of these dealings, that the \$937.50 was computed as commissions on the basis of 3/4 per cent of the first

loan before the second mortgage was considered.

Then the parties and the lenders through their representatives appeared in the office of the Chicago Title & Trust Company, which was to hold the papers in escrow, both the lenders refused to consummate the deal because the statement in the application as to the amount of the income from the property in question exceeded the correct amount, and that the sum was only about \$28,000; and, further, that the title to the property was not in the Jarke. The applications were drawn up by defendant and submitted to plaintiff for his signature. He claimed that the amount of income was not stated therein when he signed them, and that he had merely told defendant it was approximately \$30,000. On this point also there was conflicting testimony. However, we do not regard it as a controlling fact in the case; and if so, the court evidently accepted plaintiff's version.

After the lenders refused to consummate the loans to plaintiff he disposed of his interest in the contract for purchase of the property in question to one Tow, and the latter with Mrs. Jarke subsequently consummated a loan from the Kaspar American State Bank on the property in question for \$112,000. To save recordation of the trust deed and bonds that had already been prepared the parties used the same papers, canceling the printed bonds in excess of that sum. It was in fact a new loan and regarded as such by all parties. It was not a consummation of plaintiff's application for a loan, nor treated as such, and hence has no bearing on plaintiff's right to recover the amount paid defendant as commissions, if, as the evidence tends to support, they were paid upon defendant's misrepresentations that the loans had been procured. Plaintiff's undertaking was to pay commissions for procuring the loans applied for. They did not become available to him, as claimed by defendant in its pleading. On the

from before the return mortgage was considered.

Then the parties and the witness returned to their respective
 appeared in the office of the Chicago Title & Trust Company, which
 was to hold the mortgage in return, with the mortgage returned to them
 contained the debt because the statement in the application as to the
 amount of the income from the property in question amounted to the
 correct amount, and that the sum was only about \$10,000 and, further,
 that the title to the property was not in the hands. The application
 was drawn up by defendant and submitted to plaintiff for his sig-
 nature. It claimed that the amount of income was not stated therein
 when he signed them, and that he had never said otherwise. It was
 approximately \$10,000. In this point also there was conflicting
 testimony. However, as it was stated in the application that in the
 case and it was the court's duty to accept plaintiff's version.
 That the lender's failure to communicate the facts to
 plaintiff as respects of the interest in the subject of the mortgage
 of the property in question, one fact, and the fact with the
 title accordingly communicated a loan from the Chicago American State
 Bank on the property in question for \$10,000. It was a violation of
 the trust deed and bonds and although both reported the service
 were the same together, considering the printed bonds in return of that
 sum. It was in fact a new loan and regarded as such by all parties.
 It was not a continuation of plaintiff's obligation for a loan.
 not intended as such, and hence was no binding on plaintiff's right to
 recover the amount paid defendant as consideration, but on the con-
 sideration of the fact, they were held upon defendant's misrepresentations
 that the loan had been received. Plaintiff's obligation was to pay
 consideration for securing the loan applied for. They did not become
 available to him, as stated by defendant in its pleading. On the

contrary, he stood ready and willing to take the loans, but the proposed lenders refused to make them as aforesaid.

Under the above state of facts, appellant's contention that it was entitled to commissions for having brought the parties together whether the loans were consummated on the precise terms originally proposed or not is untenable.

Equally untenable is appellant's contention that it was a mere middleman and not a broker within the rule forbidding acceptance of commissions from both parties to the transaction without the knowledge and consent of the broker's principal. Both in its pleading and the written application under which defendant was employed it is referred to as plaintiff's broker. That the rule referred to is applicable in such a case is hardly open to question. Defendant admits making an arrangement for commissions with the Kaspar Bank, and plaintiff's testimony that he neither knew of nor consented to it, is not denied.

Appellant's final contention is that the court erred in refusing argument by defendant's counsel at the close of the evidence. Regardless of the merits of such a contention there is nothing in the record upon which to base it.

The judgment is therefore affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

913 106, 1000, 1001 and 1002 are shown in the figure.

* blawieyly ee mof? wdey ef BlynTer wdey? BlynTer

State the name of the person who is the subject of the report.

(continued from page 7)

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

... (faint text) ...

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and positive adjustment of all nations and peoples.

...including a 'new' all to America has established

temperatures are sometimes rather high, and conditions are often very dry.

10. *Chlorophyll a* and *Chlorophyll b* content of the leaves was determined by the method of Arnon and Whistler (1940).

American Journal of Nursing, Vol. 89, No. 6, June 1989

and recall all the conditions of the contract in order to

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Journal of Management Inquiry 22(1) 27-41

a) $\frac{1}{\sqrt{2}}$ b) $\frac{1}{\sqrt{2}}$ c) $\frac{1}{\sqrt{2}}$ d) $\frac{1}{\sqrt{2}}$

...and the ...

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1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 26

Journal of Interpersonal Violence 26(10) 1978-1997
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...and the other two are ...

7007a
32841

CLEVER TRUTH PUBLISHING COMPANY,
Appellee,

v.

J. O. STOLL, doing business as
the J. O. STOLL COMPANY,
Appellant.

250 I.A. 647

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This action was brought to recover a claimed balance due from defendant under an agreement to distribute plaintiff's magazines. Under the agreement monthly issues of the magazines in question were distributed by defendant for and from June to December, 1925, when the agreement terminated. A statement of account as claimed by plaintiff for those months is appended to its statement of claim, and an itemized statement of the account as claimed by defendant is appended to his affidavit of merits. Plaintiff claimed as due under the account \$2187.61. Defendant admitted as due \$34.34. The case was tried without a jury, and the court assessed plaintiff's damages at \$1572.74.

The points made by appellant are (1) the admission of improper evidence offered by plaintiff; (2) that plaintiff did not make proof of its case by a preponderance of evidence, and (3) that the court's finding is manifestly against the weight of the evidence.

After a preliminary talk as to an arrangement for defendant to distribute plaintiff's magazines, had between one Towne, plaintiff's then president, and defendant, defendant

wrote a letter under date of May 11, 1925, to plaintiff confirming the conversations, and saying:

" * * * * *

We will pay you at the rate of 16c per copy, you to allow us a service of 2c per copy on the total number of copies distributed with the exception of those that we distributed in the City of Chicago, and there is only to be a service of 1c a copy allowed on the number we distribute in Chicago.

We agree to pay you for the first issue, less returns, ten days after receipt of the third.

It is fully understood that you are to allow us full credit for returns, * * *

We expect you to cooperate with us in regards to some of the large cities where it is necessary to guarantee the agent a certain income for distributing Clever Truths in his particular city.

With a magazine such as you contemplate publishing, we feel that where these guarantees are necessary, the commission derived from the sale of the magazine, will amply provide.

* * *

(signature)

This letter was acknowledged July 21, 1925, in this

language:

"Acknowledging your letter of May 11th, we are pleased to accept your conditions for distribution of our magazine known as Clever Truths, with the exception of the point you bring out in the fifth paragraph of your letter, which mentions our cooperating with you regarding a guarantee to those dealers who demand it.

The understanding with Mr. Stoll is that this guarantee is unnecessary and consequently this point is to be ignored. We also wish it to be understood that the J. C. Stoll Company or Clever Truths Company may cancel any and all agreements upon two weeks' notice. This cancellation is not to prejudice or jeopardize any payments or money due either concern.

We trust that the above is entirely satisfactory and hoping that our business connections will be long and of mutual benefits.

Very truly yours,"

(signature)

These letters were introduced in evidence as plaintiff's exhibits A and B, respectively.

Appellant's first point relates to the admission of exhibit B, and plaintiff's exhibits 1 to 7.

The point as to exhibit B is that a carbon copy of the letter was introduced without laying a proper foundation by showing notice to produce the original, and proving that the carbon copy was a true copy, and that the original was mailed to defendant or received by him. Defendant's counsel admitted at the trial that the original was demanded. And there was proof that the carbon copy was a correct copy of the original. While there was no formal proof of mailing the original, there was proof, not disputed, that it was referred to in a subsequent conversation admittedly had with defendant with reference to the provision therein as to guaranteeing a certain income to defendant's agents in large cities. Defendant's failure to dispute the evidence that such letter became the basis of that conversation tends strongly to support the inference that he received the same.

As to the admissibility of plaintiff's exhibits 1 to 7, consisting of statements of shipments, it is enough to say that they were introduced merely to show the amount of the shipping charges, which defendant admitted were to be divided between the parties. They were admissible for that purpose. But so far as we are able to ascertain, the court's findings were based upon specific items of liability, with reference to which the points on appeal as to the weight of the evidence are argued.

These items appear to be the only ones in controversy on which the court's findings were founded. They relate to credits claimed by defendant.

The first item amounts to \$609.23. It is the difference between the 2c and 1½c rate for distributing the magazines, beginning with the September issue. It will be noted that under

defendant's letter of May 11, he was to pay for the first issue (the June issue of the magazine), less returns ten days after the receipt of the third issue. The issues were shipped to him in the month previous to the month they purported to be issued. On August 4, 1925, defendant sent a statement of the June, July and August issues to plaintiff showing a balance in plaintiff's favor, but subject to later returns. The letter stated that as soon as the September issue was received payment would be made in full of the July issue. After this August statement was received the president and vice-president of plaintiff called on defendant and expressed their dissatisfaction and asked for a reduction in the service charges. Plaintiff's proof was to the effect that in that interview defendant agreed to reduce the so-called "national" or "out of town" service charge from 20 to 1½c, and that in a subsequent interview, after the submission of the September statement, it was agreed that the reduction would commence with the September issue. While defendant denied making any such agreement we cannot say that the court was not justified in believing the testimony of plaintiff's two witnesses on that subject, especially as Mr. Stoll's manager was present at the conversation and not called as a witness by Stoll to corroborate him.

The next item in dispute amounts to \$312.50, being one-half the service charges that defendant allowed to his out of town agents. In his letter of May 11, defendant referred to cooperation by plaintiff where it was necessary to guarantee agents in large cities a certain income for distributing the magazines. In the acknowledgment of that letter by the letter of July 21, aforesaid, it would appear that there had been in the meantime an understanding that no such

guarantee would be necessary. We have already referred to the fact that that letter must from the evidence be deemed to have been received. It was written before any statement of account was made by defendant to plaintiff. Defendant practically admits it became a subject of conversation and explains the matter by saying that it was only in consideration of plaintiff's allowing one-half of these service charges that he agreed to pay one-half the shipping charges, all of which he would appear to have been obligated by law to pay. We think the court was justified in finding not only that there was a modification of the contract with reference to the service charge for distribution from 2c to 1½c, but that whatever the understanding prior to the conversation on the matter in September the parties reached a mutual understanding that there was no agreement or obligation by plaintiff to guarantee an income to any of defendant's distributing agents.

The other items included in the court's findings of defendant's liability are \$36.00 for copies of magazines shipped by plaintiff and not admitted in defendant's statement of account; \$35.40, the difference between the records of plaintiff and defendant as to allowances for magazines returned; \$44.75 shipping charges not admitted in defendant's statement of account, and the balance of \$34.84 admitted by defendant to be due, a total of \$1572.74, which is some \$600 less than plaintiff's claim. We have carefully examined the evidence relating to these items and without undertaking an analysis of it in this opinion we have reached the conclusion that the court was warranted from the evidence in including these items as proper charges against defendant. We are unable to say that its findings were against the manifest weight of the evidence, and hence the judgment will be affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

32881

THE FOREMAN TRUST & SAVINGS
BANK, admr., etc.,
Appellant,

v.

ALBERT ROSSI,
Appellee.

7006
250 I.A. 647²
APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a proceeding under section 89 of the Practice Act. Under it appellee moved to vacate and set aside a default and judgment entered against him at a previous term of court in a suit brought by appellant under the Injuries Act. Appellant demurred to the motion. The demurrer was overruled, and appellant having elected to stand by the same the motion was granted. This appeal followed.

The sole question presented, therefore, is as to the sufficiency of the motion, which properly appears in the common law record inasmuch as in this kind of a proceeding it stands as a pleading in a new suit and takes the place of a declaration. (Mitchell v. King, 187 Ill. 452; Domitaki v. American Linseed Co., 221 id. 161; Smyth v. Farge, 307 id. 300; Marris v. Chicago House Wrecking Co., 314 id. 500.) Appellee's motion to strike the motion to vacate because not preserved in a bill of exceptions, which was deferred to the hearing, is, therefore, denied.

The motion to vacate under section 89 is predicated on the theory that the facts set forth as its basis constitute an excusable mistake which if known by the court would have precluded a rendition of the judgment. They are, that immediately after appellee was

served with summons in the injury suit made returnable to the October term, 1927, he caused the summons to be delivered to the stenographer in the office of his attorneys and the stenographer placed the same "in the file and did not at any time inform any of the attorneys occupying said office that said summons had been received, and none of said attorneys ever had knowledge of its receipt until about, to-wit, March 1, 1928."

The default was entered in the December term, 1927, and the judgment in the January term, 1928.

It seems almost too obvious for discussion that the fact relied upon to excuse appellee's attorneys from appearing in the case to prevent default or judgment, namely, their ignorance of the summons left in their office, was not "a mistake" in the course of court proceedings but the consequence of negligence in their office. Even if the court could take cognizance of such "a mistake," as said in Loew v. Krauspe, 320 Ill. 244, 255, the motion "is not intended to relieve a party from the consequences of his own negligence." And it is familiar law that in court proceedings a party is chargeable with negligence of his attorneys.

The demurrer should have been sustained. Accordingly the order appealed from is reversed.

REVERSED.

Gridley, P. J., and Scanlan, J., concur.

32910

HARRY T. VINNEDGE et al.,
Appellees,

v.

MYSTIC WORKERS OF THE WORLD
et al.,
Appellants.

7009a
250 I.A. 647

INTERLOCUTORY APPEAL
FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Complainants filed their original bill herein on behalf of themselves and other members of the defendant society, Mystic Workers of the World, making said society and certain of its officers and directors defendants thereto. The society was incorporated in this State, not for pecuniary benefit, but to make provision for the payment of benefits in case of death of its members under certain circumstances. The bill asks for an accounting of the alleged misuse of the society's moneys, and relief by injunction, temporary and permanent, against the enforcement of certain by-laws designated as sections 93, 94 and 98, which make changes in the rates of assessment from those existing when complainants became members of the society, and from enforcing a by-law designated as section 122-A, forbidding any lodge, officer or member from publishing, issuing or circulating any circular, resolution or document derogatory to the ritual, laws or general management of the society or any of its officers thereof, on penalty of discipline at the discretion of the Board of Directors for the offense after proper proof thereof.

In substance the grounds upon which relief by injunction

25014.647

INVESTIGATION UNIT
FROM CHIEF OF UNIT
DATE 1/1/54

HENRY T. FARMER, JR.
1/1/54

WYATT BROWN, JR.
1/1/54

MR. JAMES EARL RAY, JR. (AKA) THE SUBJECT

Investigation Unit (I.U.) advised that on 1/1/54
of the subject and other members of the subject party, specific
members of the party, making such contact with members of the
officers and directors of the subject party. The subject and the
corporate in this case, and for monetary benefit, and to make
provision for the payment of benefits in case of death to the
members under certain circumstances. The will also be an agreement
of the subject matter of the subject's money, and the fact of
insurance, property and personal, against the subject matter of
certain by-law designed to provide for the subject, which was
changed in the case of insurance from such existing when
subject's former members of the subject, and then making a
by-law designed to assist the subject in the subject and make, others
to member from the subject, making to the subject and subject.
provision of financial security to the subject, from the subject
management of the subject in the subject subject, in the
of the subject of the subject of the subject of the subject for the
others after proper subject.

In substance the subject was called by the subject

is sought is that said sections 93, 94 and 95 were adopted as a result of a wrongful conspiracy against the members of the order, are invalid and violate the complainants' contract of insurance, and that the by-law, section 122-A is likewise invalid, void and unconstitutional and therefore should not be enforced against them.

In the following term a cross-bill was filed by defendant society, which sought in effect under certain averments of fact the enforcement of its said by-laws, especially section 122-A, and a temporary injunction prayed for therein was ordered. The cross-bill was subsequently dismissed on motions of cross-defendants. Cross-complainant appealed from said order of dismissal, and on its application to this court the injunction under the cross-bill was by order continued in force pending the appeal from said order of dismissal. In that case, No. 32752, we have this day reversed said order of dismissal.

Upon stipulation of the parties herein it was ordered on July 13, 1928, that the record and abstracts in said case No. 32752 be referred to in connection with the record filed herein.

The two records show the following proceedings:

The bill was filed January 28, 1927. February 2, 1927, an order was entered restraining and enjoining defendants to the bill from forfeiting, cancelling or in any way changing the terms of, or the amount to be paid under any existing contracts of insurance, with assessment plan, issued by defendant society to complainants or other members similarly situated, on which contracts of insurance assessments had not been paid or shall not be paid on the basis of increased rates of insurance complained of in the bill. On March 11, 1927, defendants (except one Bailey) filed their joint and

several answer to the bill. On April 26, 1927, the defendant society, Mystic Workers of the World, filed its cross-bill, naming as cross-defendants complainants in the original bill and other members of the society. Thereafter, on May 10, 1927, on motion of cross-complainant and defendants to the original bill an order was entered restraining and enjoining cross defendants from (a) using the name of "Mystic Workers" or "Mystic Workers of the World;" (b) from printing, promulgating or circulating as an organization or committee any circular, resolution or document in any way relating to the laws or general management of the Mystic Workers and derogatory to the Mystic Workers; (c) from requesting, urging or persuading as such organization or committee any member of the Mystic Workers to violate or refrain from observing its duly enacted laws and rules of regulation, and (d) from holding any meeting or meetings in the name of the Mystic Workers or Mystic Workers of the World. On the same day was entered the order dissolving the injunction of February 2, 1927, as aforesaid.

On August 5, 1927, it appearing that certain defendants to the cross-bill (not parties to the original bill) served with summons, were in default and had failed to except, demur, plead or answer to the cross-bill, an order was entered that the cross-bill be taken as confessed against them; and on the same day on a like motion it was ordered, adjudged and decreed that the cross-bill be taken as confessed against the cross-defendants who were complainants to the original bill for failure to comply with a rule on them, entered May 31, 1927, to plead to the cross-bill, etc.

On August 18, a "special appearance" was filed by the several cross-defendants, not parties to the original bill, and also a separate "special appearance" by the cross-defendants who

who were complainants in the original bill, together including all against whom the cross-bill was taken as confessed as aforesaid, for the special purpose of supporting their respective motions filed therewith to dissolve the injunction entered under the cross-bill, and to dismiss the same on the specified grounds that it was not germane to the subject matter of the original bill, that the cross-defendants other than the original complainants were not parties to the original bill, and that the relief sought in the cross-bill was not remotely or indirectly involved in the relief sought in the original bill. On the same day the same cross-defendants moved to vacate the temporary injunction entered under the cross-bill on the ground that the court was without power and jurisdiction to entertain and restrain ^{said} cross-defendants from doing the acts set out in the order granting the temporary injunction, and that the subject matter of the cross-bill was not germane to the original bill, and that they were not parties to the original bill.

Said motions do not appear to have come up before the court until April 6, 1928, when the court entered an order that the cross-bill be dismissed as not germane to the original bill, from which cross-complainant prayed and was allowed an appeal as aforesaid.

In our opinion filed this day in case No. 32752 we have reversed the order dismissing the cross-bill, holding that the parties moving to dismiss the same had no standing in court to make such motion based on other than jurisdictional objections.

On May 16, 1928, on motion of complainants in the original bill based upon the affidavit of Mary Winters, one of the complainants, and a complaint by George Howe, member of a subordinate lodge in Morrison, Illinois, addressed to the President and Board of Directors

of defendant society against certain members of a subordinate lodge in Iowa (who were made defendants to the cross-bill) that they had violated the laws of the order in certain respects therein set forth, and particularly the provisions of said section 112-A, the temporary injunction herein appealed from was entered, restraining defendant and certain of its officers and directors from suspending, expelling or in any manner disciplining any lodge member or officer of the defendant society or forfeiting the charter of any subordinate lodge "on account of violating section 122-A of the by-laws of said order by publishing, issuing, circulating, writing or acting upon any circular, resolution or document derogatory to the ritual, laws or general management of the society, and that the president of defendant society desist and refrain from exercising any authority in carrying out the provisions of said section 122-A."

The affidavit of said Mary Winter after setting forth the several proceedings had under the bill and cross-bill as aforesaid, and the complaint of said George Howe, alleged that said section 122-A of the defendant society had already been adjudicated by the court as an illegal by-law, and that unless members of the defendant society be restrained and enjoined from proceeding in any manner or form under said sections 93, 94, 98 and 122-A pending the hearing of the bill the rights of complainants and other members similarly situated would be unduly prejudiced, and they in all probability would be proceeded against and expelled and deprived of their rights under their certificates.

It will thus be perceived that the two temporary injunctions, the one granted under the original bill and the one granted under the cross-bill, are wholly antagonistic in theory. The injunction under

the bill in effect does nothing more than to restrain the defendant society and its officers from enforcing its by-law, section 122-A aforesaid. Whereas the effect of the injunction granted under the cross-bill is to enforce that same by-law. As before stated, the latter injunction was ordered continued by this court, and under the opinion filed as aforesaid, reversing the order dismissing the cross-bill, it must continue to stand. It stands, therefore, by the order of this court on April 16, 1928, as in force from the date it was entered, namely, on May 19, 1927. In view of our order of April 16, 1928, it was inconsistent, if not irregular, for the court below thereafter to enter an antagonistic order of injunction under the original bill, and thus in effect deprive cross-complainant of the right to the continuance of its injunction under the cross-bill as ordered by this court.

But it will be perceived when reduced to the final analysis of the record, that the injunction under the original bill herein appealed from was based mainly if not solely upon the theory that the trial court in dismissing the cross-bill had adjudicated that section 122-A was invalid and illegal. But such is not the fact. As stated in our opinion above referred to, the record discloses that the cross-bill was dismissed on the sole ground that it was not germane to the original bill. Notwithstanding this showing of the record the argument of appellees is based almost wholly upon the contention that because, as they state, the invalidity of said section 122-A was argued before the court it was adjudicated in the dismissal of said cross-bill. Whether argued or not, the order dismissing the cross-bill speaks for itself, as said in our opinion referred to, and bases that dismissal on one ground only, namely, that the cross-bill

-7-

was not germane to the original bill.

Accordingly the order of injunction herein appealed from
will be reversed.

REVERSED.

Gridley, P. J., and Scanlan, J., concur.

and not return to the original list,
interestingly the order of information could be changed from
will be reversed.

REMARKS.

Griffith, P. J., and Llewellyn, J. J., 1900.

31630

7010a
CHARLES F. LOBELL, DUNCAN G. BELLOWE
and FREDERICK J. LOBELL, partners,
doing business under the partnership
name of Lobell, Bellows and Lobell,
Plaintiffs in Error,

vs.

MARGARET BROCKHOUSE LEVY,
Defendant in Error.

250 I.A. 647⁴

ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCAMMEL DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, Charles F. Lobell, Duncan G. Bellows and Frederick J. Lobell, partners, doing business under the partnership name of Lobell, Bellows and Lobell, plaintiffs, sued Margaret Brockhouse Levy, defendant, in an action on contract. The case was tried before the court with a jury and there was a verdict returned finding the issues against the plaintiffs. Judgment was entered on the verdict and plaintiffs have prosecuted this writ of error. The defendant has filed neither an appearance nor a brief in this court.

The plaintiffs sued to recover on a promissory note for \$500, executed by the defendant and payable to the plaintiffs. The sole defense interposed in the affidavit of merits is that there was no consideration for the note.

The evidence discloses that the defendant employed the plaintiffs, who were engaged in the real estate business in the city of Chicago, to negotiate, on her behalf, with one M. J. Huttner for the purchase of certain real estate owned by the latter and which the defendant was anxious to buy. The defendant deposited with the plaintiffs her check for \$5,000 as earnest money. The plaintiffs devoted considerable time and effort to consummate a deal between the defendant and Huttner and after a number of negotiations between the parties they apparently came together on terms, and a written contract embodying these terms

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

THE UNIVERSITY OF CHICAGO

was drawn by the plaintiffs and signed by the defendant. Before Huttner could sign the contract the defendant went to the plaintiffs and stated that she would be unable to go on with the deal unless a certain change was made in the terms of payment, and on being informed by Mr. Lobell, of plaintiff firm, that he did not think that Mr. Huttner would consent to the proposed change the defendant demanded the return of her check for \$5,000 and the written contract. Mr. Lobell insisted that he had earned his commission, and he inquired of the defendant why she had so suddenly changed her mind about the deal, and he asked her if she was attempting to consummate the deal through some other agent. The defendant responded that she was not attempting to beat the plaintiffs out of their commission in any such way. It clearly appears from the record that after a discussion between Mr. Lobell and the defendant they arrived at a settlement by the terms of which the defendant agreed to pay the plaintiffs \$1,500 for their commission. It further appears that the settlement agreement was reduced to writing and that the defendant dictated part of the same. We do not find in the record any evidence tending to show that there was actual or constructive fraud in the making of this settlement. In fact, it would appear that the defendant, in the matter of the settlement, was concerned only as to the terms of the same. Mr. Lobell insisted that \$2,000 would be a fair settlement. The defendant offered \$1,000, which was refused, and they finally agreed on \$1,500 as the amount. The defendant said she did not have the entire \$1,500 in the bank, and it was arranged that she should give a check for \$1,000 and the \$500 note in question. This arrangement was carried out, and the \$5,000 earnest check and the contract she had signed were returned to her.

The plaintiffs contend that the evidence fails to show a want of consideration for the note and that therefore the verdict of the jury was not warranted by any proof.

It is not necessary in the present case to determine whether the plaintiffs had a legal claim for commission against the defendant at the time of the making of the note in question, as the compromise of a doubtful right, though it afterwards turns out the right is on the other side, when there is neither actual nor constructive fraud, and the parties act in good faith, with full knowledge of the facts, is a sufficient consideration to support a promise. (Honeyman v. Jarvis, 79 Ill. 318.) There a person as a result of a compromise agreement gives his promissory note in settlement of a doubtful claim he is liable thereon and cannot urge want of consideration for the note, even though the claim would not have been legally enforced against him, where there was neither actual nor constructive fraud and the parties acted in good faith with full knowledge of all the facts. (Greer-Wilkinson Lumber Co. v. Heeves, 184 Ill. App. 575; see also Kranzeyer v. Buck, 258 Ill. 596, 598.)

We think there is also much force in the contention of the plaintiffs that the affidavit of merits filed by the defendant did not set up a valid defense against the promissory note.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

32605

7011a
250 I.A. 647⁵

ORIE MUMFORD,
Defendant in Error,

v.

COYNE ELECTRICAL SCHOOL,
a corporation,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, in an action of the fourth class, Orie Mumford, plaintiff, sued Coyne Electrical School, a corporation, defendant, to recover damages for an alleged breach of a contract. The suit was tried before the court without a jury and at the conclusion of the evidence the court found the issues against the defendant and assessed the plaintiff's damages at \$216.94. This writ of error followed. The plaintiff has not filed an appearance nor a brief in this court.

We find the material facts in the case substantially as follows: The defendant is an institution that teaches electricity, and it would appear from the evidence that it advertises in the press the advantages of the institution. The plaintiff worked on a farm near Rutledge, Missouri. He read the advertisements of the defendant and with a friend, Kenneth McMillen, also from Rutledge, he came to Chicago to arrange for a course at the defendant school. The defendant conducted an employment and a welfare department in connection with the school, but claims that it did not promise to obtain its pupils work while they pursued their studies, but it agreed only to use its best efforts to obtain employment for the pupils

THE COURT,
In view of the fact,
that the plaintiff's
evidence is not
sufficient to establish
the defendant's liability,
the court finds in favor
of the defendant.

IT IS ORDERED THAT
THE DEFENDANT DO
PAY TO THE PLAINTIFF
THE SUM OF \$100.00
WITHIN THIRTY DAYS
OF THE DATE OF THIS
JUDGMENT.

THE COURT FINDS IN FAVOR OF THE DEFENDANT.

In the plaintiff's case, it is shown by the
evidence that the defendant's liability is not
established. The plaintiff's evidence is not
sufficient to establish the defendant's liability.
The court finds in favor of the defendant.
The plaintiff's evidence is not sufficient to
establish the defendant's liability. The court
finds in favor of the defendant.

The court finds in favor of the defendant.
The plaintiff's evidence is not sufficient to
establish the defendant's liability. The court
finds in favor of the defendant.
The plaintiff's evidence is not sufficient to
establish the defendant's liability. The court
finds in favor of the defendant.
The plaintiff's evidence is not sufficient to
establish the defendant's liability. The court
finds in favor of the defendant.
The plaintiff's evidence is not sufficient to
establish the defendant's liability. The court
finds in favor of the defendant.

"in a good position," as soon as they satisfactorily completed their course at the school. The plaintiff and McMillen called on the registrar of the school and the latter was desirous of having them enroll as students. They both stated to him that they would be financially unable to enroll unless they secured employment right away, and the registrar told them that if they would enroll he would secure them employment right away and that they could go to work any time they wished. The young men replied that they wanted to go to work right away. The plaintiff thereupon paid the registrar \$316.25, \$15 of this being for insurance and \$5.25 for books, and the balance was to pay for tuition for the full course. The evidence clearly shows that the plaintiff's financial situation was such that it was necessary for him to obtain employment if he were to take the course at the defendant institution and that the defendant understood at the time of the making of the contract the financial circumstances of the plaintiff. Immediately after the plaintiff had paid the money to the registrar, the latter pushed a paper toward the plaintiff and said to him: "Sign this and you will be enrolled in the school." This paper was not read by the plaintiff, nor was it read to him, and the plaintiff, assuming from what the registrar said, that it was a mere enrollment record, signed the paper. When it was offered in evidence by the defendant it turned out to be a contract between the plaintiff and the defendant in the matter of his tuition. The only provision in the contract in respect to work is the following: "That the school will use its efforts to place me in a good paying position as soon as I have satisfactorily completed my course or at any time thereafter." On direct examination the registrar did not in any way attempt to rebut the statements of the plaintiff and McMillen that he promised

them work right away if they would enroll. All that developed on cross-examination in reference to the said question was the following:

"Q. And you don't remember telling Mr. Mumford that you would see that he got employment right away? A. That I told him personally?

Q. That he could get employment right away when he enrolled in the school so that he could work while he was studying? A. No, sir.

Q. You didn't say that. You knew he came from Missouri, didn't you?

A. I did. Q. Nothing was said about that at all? A. Well,

ordinarily a great many boys speak of employment, but they are -

Q. You don't tell them anything about employment? A. We don't tell them that they are going to get employment." It is evident from an inspection of the record that the registrar did not clearly and positively deny the statements of the plaintiff and McMillen with reference to the alleged promise, and he admitted that he did not know whether the plaintiff or McMillen read the paper or not. In the examination of the registrar, the following occurred: "Q. You didn't tell them that in that contract they stated that they have read over the contract, that he has read it and understands the contents of it, do you? A. We don't do that, no. Q. You don't tell them that it contains that provision? A. They have all got the same opportunity to read it, but some do and some do not." The plaintiff testified that nothing was said by the registrar to apprise the plaintiff that the paper he was asked to sign was a contract and the registrar, in his testimony, does not claim that he made any statement to the plaintiff regarding the character of the paper. The plaintiff, on the evening of the day that he enrolled, asked to be given work, and three or four times thereafter he made the same request. No work was furnished him. The plaintiff enrolled on August 1, 1927, and on

August 18, after making a fruitless demand for the return of his money, the plaintiff left the school.

The defendant contends that the contract between it and the plaintiff was reduced to writing and that prior negotiations of the parties in respect thereto are deemed to be merged in the document and parol evidence is not admissible to vary its terms, and that the court erred in admitting oral testimony to change and enlarge the written agreement. It is sufficient to say in response to this contention that the defendant obtained the signature of the plaintiff to the alleged contract by artifice and misrepresentation and the alleged contract is therefore not binding upon the plaintiff.

After the evidence in the case had been presented the plaintiff was permitted to amend his statement of claim on its face instantly, and the defendant contends that "the amendment added words that seemed to take the case out of the contract class, changing it to fraud and deceit;" that in such an action a promise to perform an act, though accompanied at the time with an intention not to perform, is not such a representation as can be made the ground for an action of deceit, and "that the evidence submitted could not support a finding of fraud and deceit, and that the judgment of the Municipal Court should be reversed." We note that neither during the trial of the cause nor in the assignment of errors did the defendant raise the question of a variance between the amended statement of claim and the proof. However, it is a sufficient answer to the instant contention to say that this is a fourth class action in the Municipal Court of Chicago, "where no written pleadings are required." (Bruner v. Grand Trunk Western Ry. Co., 319 Ill. 421, 425; Winitz v. Kornblith, 248 Ill. App. 108, 111; Lurie v. Brewer, id. 525, 531.) The evidence of the plaintiff made out a clear case of breach of contract.

No point is made as to the amount of the finding, and after a very careful examination of all the facts and circumstances in the case we have reached the conclusion that justice demands that the judgment of the Municipal Court of Chicago be affirmed, and it is so ordered.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

DOI: 10.1002/for

DECLASSIFIED BY: 6032 JAL/STP Date: 06-11-2013

1993. *Journal of Interpersonal Violence*, 8, 1, 10-20.

2. The Committee of Advisors to President Jackson did not recommend that

10-75070 (2)

Source: U.S. Census Bureau, *Current Population Reports*, 1990.

32691

70/2a

250 I.A. 648¹

LEWIS C. BROWN,
Appellee,

v.

CHARLES J. GREENSTREET,
Appellant.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Superior Court of Cook County, in an action in assumpsit, Lewis C. Brown, plaintiff, sued Charles J. Greenstreet, defendant. The case was tried before the court with a jury and there was a verdict returned finding the issues for the plaintiff and assessing his damages at the sum of \$5000. Judgment was entered on the verdict and this appeal followed.

In 1925 the defendant was a stockholder in, and a heavy creditor of the Consolidated Oil Refining Company. The Company was in the hands of receivers appointed by the Supreme Court of New York and that court was threatening to sell all of the property of the Company to pay its debts. The defendant was of the opinion that if the receivers could be removed and the Company given a little working capital it would be able to pay off its debts and become a valuable going business. During June and July, 1925, the defendant attempted to interest men of means in the refinancing of the company and in August, 1925, an employee of the defendant introduced him to the plaintiff. The defendant explained the situation to the plaintiff and told him that he wanted him to find somebody who would finance the Company. As a result of the con-

22847

2501 A. 848

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEWIS C. BROWN,
Defendant,
vs.
UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK,
Plaintiff.

MR. JUSTICE MURPHY: THE COURT ON THE 10th day of

in the Superior Court of Cook County, in an action to
renew, Lewis C. Brown, Plaintiff, and United States District
Court, Defendant. The case was first heard on the 10th day of
there was a verdict returned finding the issues for the Plaintiff
and assessing his damages at the sum of \$1000. Judgment was
entered on the verdict and this appeal followed.

In 1925 the defendant was a salesman for and a partner
operator of the Associated Mill Building Company, the company
was in the hands of receivers appointed by the Superior Court of Cook
County and that court was returning to him all of the property of
the company to pay its debts. The defendant was at the time
that if the receiver could be trusted and the company given a
little working capital it would be able to pay off its debts and
become a valuable going business. During June and July, 1925, the
defendant attempted to induce one of names in the receiving of
the company and to induce, later, an employee of the defendant
influenced him to the plaintiff. The defendant explained the
situation to the plaintiff and told him that he wanted him to take
somebody else would finance the company, as a result of the

ference the following instrument was executed:

"Chicago, Ill., August 31, 1925.

Mr. L. C. Brown is authorized to secure a loan or some one to underwrite a Bond issue in the sum of two hundred fifty thousand dollars (\$250,000.00) on the Oil Refining Plant of the Consolidated Oil Refining Co. at East Chicago, Indiana, or to introduce me to some one who will finance this plant to the extent of \$250,000.00; and if the party or company indicated below finances this business to the extent of \$250,000, it is hereby authorized to pay to Mr. L. C. Brown the sum of five thousand dollars (\$5,000.00) out of the proceeds of such loan in full for his commissions for securing said loan.

(Signed) Chas. J. Greenstreet.

The party or company referred to above is,
Bangler Lapham & Co. and Bartlett and Gordon.
L. C. Brown."

The plaintiff interested Mr. Gordon of Bartlett & Gordon, Inc., a Chicago investment firm, in the scheme of financing the Company. Finally Mr. Gordon told the plaintiff that it was impossible to finance the Company in the manner contemplated by the instrument of August 31, 1925, but that the Bartles-Maguire Oil Company, of Milwaukee, Wisconsin, might purchase the property. The plaintiff testified that he then went to the defendant and told him that he had found great difficulty in getting anybody interested in financing the proposition but that he thought a sale could be made of the property, and that he asked the defendant if the latter would pay him the \$5,000 in case he secured a sale of the property, and the defendant assured him that he would; that thereafter the plaintiff told the defendant that the name of the prospective purchaser was Bartles-Maguire Oil Company, of Milwaukee. The evidence for the plaintiff also tends to show that through the efforts of the latter the Bartles-Maguire Oil Company and the defendant entered into negotiations and that as a result of the same the defendant was able to sell the property of the Consolidated Oil Refining Company to the Milwaukee company. By the

between the following statements and answers:

"Chicago, Ill., August 21, 1935.

Mr. J. L. Brown is requested to receive a letter on your own to administer a bond issue in the sum of \$200,000.00 to the Chicago Public Works Department. The Chicago Public Works Department is a department of the City of Chicago, Illinois, and is located at 111 North Dearborn Street, Chicago, Illinois. It is the policy of the Chicago Public Works Department to pay for the construction of public works projects in the City of Chicago. The Chicago Public Works Department is a department of the City of Chicago, Illinois, and is located at 111 North Dearborn Street, Chicago, Illinois. It is the policy of the Chicago Public Works Department to pay for the construction of public works projects in the City of Chicago.

(Signed) J. L. Brown.

The party in interest is hereby notified that the Chicago Public Works Department is a department of the City of Chicago, Illinois, and is located at 111 North Dearborn Street, Chicago, Illinois. It is the policy of the Chicago Public Works Department to pay for the construction of public works projects in the City of Chicago.

The plaintiff requested Mr. J. L. Brown to administer a bond issue in the sum of \$200,000.00 to the Chicago Public Works Department.

Chicago Investment Trust is the owner of the Chicago Public Works Department.

Finally Mr. J. L. Brown told the plaintiff that it was impossible to

finance the company in the manner contemplated by the instrument at

least \$1,000,000.00 and that the Chicago Public Works Department was

unable to finance the company. The plaintiff

therefore went to the Chicago Public Works Department and told the

Chicago Public Works Department that it was impossible to finance the

company and that it was necessary to raise the sum of \$1,000,000.00

to finance the company. The Chicago Public Works Department

therefore went to the Chicago Public Works Department and told the

Chicago Public Works Department that it was impossible to finance the

company and that it was necessary to raise the sum of \$1,000,000.00

to finance the company. The Chicago Public Works Department

therefore went to the Chicago Public Works Department and told the

Chicago Public Works Department that it was impossible to finance the

company and that it was necessary to raise the sum of \$1,000,000.00

to finance the company. The Chicago Public Works Department

therefore went to the Chicago Public Works Department and told the

terms of the agreement the receivers were paid \$175,000 and the defendant received 820 shares of preferred stock in the Bartles-Maguire Oil Company. In addition to the cash, the receivers also received \$40,000 of stock in the latter company.

The defendant contends that, conceding for the sake of argument that a contract was entered into between the plaintiff and the defendant for the payment of a commission for securing a purchaser of the Consolidated Oil Refining Company, nevertheless, the verdict was against the manifest weight of the evidence, as the proof shows that the plaintiff had abandoned the deal with the Bartles-Maguire Oil Company before that company became really interested in the matter. After a careful consideration of all the facts and circumstances in the record, we are satisfied that there is no merit in this contention. Aubrey G. Maguire, president of the Bartles-Maguire Oil Refining Company, testified that in an interview he had with the defendant on the occasion when the parties came together in the matter of terms, the defendant asked him to increase his offer for the reason that "he had to take care of Mr. Brown for about \$5,000." Robert D. Gordon, president of the Bartlett & Gordon company, whom the plaintiff had interested in the scheme, testified that just about the time the deal was consummated the defendant told him that he had to pay Brown \$5,000. This witness further testified that the day before the deal was closed the defendant said to Mr. Maguire: "I have got to pay Brown \$5,000.00 and I have got to have more money for this property." We find no merit in the contention that the plaintiff abandoned the effort to sell the property in question. The defendant calls our attention to the fact that the plaintiff testified that after negotiations were started between the defendant and the Bartles-Maguire Oil Company, he

was still attempting to finance the Consolidated Oil Refining Company under the written agreement, and the defendant argues that this conduct of the plaintiff shows that he had abandoned the effort to sell the property. The plaintiff's testimony that the defendant relies upon in this regard was as follows: "We were not making rapid progress with the Bartles-Maguire deal, I did not know but that possibly it might fall through, and I kept on trying to finance it with a bond issue." This statement of the plaintiff does not support the theory of the defendant that the plaintiff abandoned the effort to sell the property before the consummation of the deal between the defendant and the Bartles-Maguire Company. Moreover, the testimony clearly shows that at the time the deal was consummated the defendant recognized that the plaintiff had not abandoned the plan to sell the property.

The defendant contends that the court erred in admitting in evidence the written instrument of August 31, 1925, because it was not relevant to any issue involved and was introduced merely to prejudice the jury. We find no merit in this contention. The defendant concedes that the counsel for the plaintiff during the trial repeatedly stated that they were not suing on this written instrument. Moreover, the defendant testified to the signing of this instrument and to the facts and circumstances surrounding the execution of the same and he stated that he was very careful to have everything relating to his agreement with the plaintiff in writing, and in connection with this testimony he referred to the instrument in question. That instrument was admitted in evidence merely as a part of the dealings between the plaintiff and the defendant, and we are unable to see how it could have prejudiced the latter. In fact, as we have noted, the defendant asserted that the instrument contained his entire agreement with the plaintiff.

The defendant contends that the court erred in permitting the plaintiff to testify that the defendant had given him an appraisal of the Consolidated properties to be used in his search for a lender or purchaser. The "appraisal" consisted of a yellow sheet of paper. The defendant has called our attention to three places in the abstract in reference to this contention. As to the first, the counsel for the defendant, after making an objection to a question, stated that it was all right, and the court was not called upon to rule. We are next referred to a question and answer in the examination of Aubrey G. Maguire. No objection was made to the question and the court was not called upon to rule in reference to the same. Our attention is also directed to an objection made to a question propounded to the witness Robert D. Gordon, and by a reference to the record we find that the court sustained the objection. It is evident that the present contention is without merit. As stated by the trial court, "the record is silent as to what the yellow sheet contained."

The defendant has had a fair trial, and the judgment of the Superior Court of Cook County should be and it is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

32760

A. F. SCHULTZ & CO.,
a corporation,
Defendant in Error,

v.

EDMUND M. PAWELSKI,
Plaintiff in Error.

701 4a
250 I.A. 648³
ERROR TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BRANLON DELIVERED THE OPINION OF THE COURT.

A. F. Schultz & Co., a corporation, plaintiff, sued Edmund M. Pawelski, defendant, in the Municipal Court of Chicago, in an action of tort. The case was tried before the court without a jury and at the conclusion of the evidence the court found the defendant guilty and assessed the plaintiff's damages at the sum of \$437.55. Judgment was entered on the finding and this writ of error followed.

The claim was for damages to the plaintiff's automobile arising out of a collision which occurred February 27, 1927, at the intersection of Sheffield and Waveland avenues, in the city of Chicago. Richard A. Pick, a customer of the plaintiff, because of the fact that his own automobile was being repaired, had borrowed from the plaintiff the automobile damaged in the collision, and he was riding in the same at the time of the collision. His son was driving the car.

Defendant relies for reversal upon the following propositions: First. Contributory negligence of the driver of plaintiff's automobile as established by the evidence. Second. Evidence was improperly admitted over the objection of the defendant with reference to the question of damage. Third. The amount

70144

2000

20014.648

THE UNITED STATES

VS.

A. F. BROWN & CO.,
A CORPORATION,
Defendant in Error.

V.

EDWARD A. BROWN,
Plaintiff in Error.

W. J. BROWN, Attorney General for Plaintiff.

A. F. BROWN & CO., a corporation, Plaintiff, was

Edward A. Brown, Defendant, in the District Court of Chicago,

in an action at law. The case was tried before the court without

a jury and the conclusion of the court was that the

defendant guilty and assessed the plaintiff's damages at the sum

of \$100.00. Judgment was entered on the finding and this writ of

error followed.

The writ was for judgment in the plaintiff's favor

and the entry of a writ of habeas corpus was denied.

The introduction of evidence of the plaintiff's character

of Chicago, which is a part of the plaintiff's character

of the fact that his own character was not relevant, but

from the plaintiff the defendant's character in the witness, and he

was riding in the car at the time of the accident. He was

driving the car.

"Plaintiff's motion for reversal was denied."

Propositions: First. Contradictory testimony of the driver of

plaintiff's automobile as established by the evidence. Second.

Evidence was improperly admitted over the objection of the defendant

and such evidence in the motion of Third. The amount

of the judgment is excessive."

As to the first contention, we are satisfied, after a careful consideration of the evidence, that it is without merit. The evidence for the plaintiff showed that the driver of the plaintiff's automobile was in the exercise of due care and caution at the time of and just prior to the collision in question, and the trial court, in our judgment, would have been justified in disbelieving the story told by the defendant as to the manner of the accident.

The undisputed evidence in the case shows that prior to the accident Richard Pick had borrowed the car from the plaintiff and that he was in undisputed possession of it at the time of the accident, and the plaintiff contends, and with much force, that Pick was a mere bailee and that his possession of the car did not involve, as to the plaintiff, any element of partnership, principal and agent, or master and servant, and that, therefore, under such a state of facts contributory negligence of Pick or his son, if any, could not be imputed to the plaintiff in the present action. In support of its contention the plaintiff cites the following: 6 C. J. 1168; Kellar v. Hipce, 45 Ill. App. 377; Spelman v. Beland, 177 Mo. App. 28. In the latter case, many of the decisions bearing upon the instant contention of the plaintiff are reviewed. However, we do not deem it necessary to pass upon this contention of the plaintiff.

As to the second contention of defendant, we have found it rather difficult to follow his argument in reference to the same. However, after a patient consideration of the same, we are satisfied that there is no merit in the contention.

As to the third contention: A witness called by the plaintiff testified to the damages to the car and the cost of repairing the

of the judgment is excessive."

As to the first contention, we are satisfied, after a

careful consideration of the evidence, that it is without merit.

The evidence for the plaintiff shows that the value of the

plaintiff's automobile was in the vicinity of two thousand dollars

at the time of and just prior to the collision in question, and the

total amount, in our judgment, would have been justified in determining

the story told by the defendant as to the nature of the collision.

The defendant's evidence in the case shows that prior to the

collision plaintiff's car was damaged and that the plaintiff and the

he was in damaged condition at the time of the collision.

and the plaintiff's testimony, and that the defendant, that there was a

belief and that his possession of the car was not lawful, as is the

plaintiff, and claims of damages. Plaintiff's testimony, as stated

and evidence, and that, plaintiff, who is a claimant of the plaintiff's

negligence of him as his son, it may, even, not be limited to the plain-

tiff in the present action. In regard to the testimony of the plain-

tiff since the following: Exhibit A - Plaintiff's testimony, at 111-112.

Exhibit B - Plaintiff's testimony, at 113-114. In the latter case, there

of the evidence showing upon the plaintiff's testimony of the plaintiff's

are reversed. However, as to the fact it is shown in the present case

conclusion of the plaintiff.

As to the second contention of defendant, we have found it

rather difficult to follow his argument in reference to the same.

However, after a patient consideration of the same, we are satisfied

that there is no merit in the contention.

As to the third contention, a witness called by the plain-

tiff testified to the damage to the car and the cost of replacing the

same, and it appeared from his testimony that the plaintiff had charged a thirty per cent profit on certain items in the bill. The trial court stated to the counsel that he would not allow the plaintiff these items of profit and he requested the counsel on both sides and the witness to go into the chambers of the court and to there go over the various items and to determine what the amount of the bill for damages should be, less the thirty per cent profit. The record shows the following: "Whereupon the interested parties went in chambers for the purpose indicated by the court, and upon their return the following proceedings were had: Mr. Haber (counsel for the defendant): We have figured the amount * * * Mr. Ryan (counsel for the plaintiff): * * * the amount we have arrived at is four hundred thirty-seven dollars and thirty-five cents." The court thereupon fixed the damages of the plaintiff at that amount. The defendant made no objection to the procedure suggested by the court. On the contrary, the record shows that he acquiesced in the same, and the court was justified in assuming from the statements of the counsel that they had agreed on the correct amount of the damages.

In the concluding part of the brief of the defendant, he contends that the conduct of the court in sending the counsel and the witness into chambers to agree on the correct amount of the damages "deprived the defendant of his right of a trial by the court." This contention, of course, is without merit.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Gridley, J. J., and Barnes, J., concur.

and, and it appeared from his testimony that the plaintiff was charged a thirty day term for the same in the jail. The trial court stated in the record that he made no other the plaintiff these lines of profit and he requested the court to send him and the witness to be into the custody of the court and to have an over the various items and to determine what the amount of the bill for damages should be. It was for thirty day term. The court about the plaintiff. Therefore the plaintiff's bill was in damages for the purpose indicated by the court, and when they returned for the proceedings were held. It was for the plaintiff. It have figured the amount of the plaintiff's bill and the amount as have arrived at in the various items and the plaintiff's bill. The court indicated that the amount of the plaintiff's bill of that amount. The plaintiff was not required to the plaintiff suggested to the court. In the plaintiff, the court stated that he mentioned in the record, and the court was satisfied in receiving from the statement of the plaintiff that they had agreed on the plaintiff amount of the damages.

In the proceedings of the trial of the plaintiff, he contends that the amount of the bill in sending the plaintiff and the witness into custody is also in the record amount of the damages received the plaintiff of his bill to a trial by the court. This contention, of course, is without merit.

The judgment of the plaintiff's bill of damages is affirmed.

WITNESSES:
J. J. and J. J. J. J.

32771

JOSEPH MUNCH,
Appellee,

vs.

MYRTLE LANDIS,
Appellant.

7015a
250 I.A. 648⁴
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE SCALLAN DELIVERED THE OPINION OF THE COURT.

The appellee, Joseph Munch, filed, in the Circuit Court of Cook County, his bill against Myrtle Landis, appellant, in which he alleges that he went through a ceremony of marriage with the appellant on June 13, 1927, but that the appellant, at the time of the ceremony, had not been divorced from one Landis, to whom she was married, and the appellee prays that his marriage to the appellant may be annulled. The appellant, in her answer, admitted the marriage to the appellee and contended that it was a valid, legal marriage as she had been legally divorced from Landis prior to the time that she married the appellee. The appellant filed a cross-bill for separate maintenance, which was never answered by the appellee although the record shows that there was a rule entered for him to plead, answer or demur to the same within ten days. By leave of court the appellant entered a motion for temporary alimony and solicitor's fees. Later it was ordered that the appellee pay the appellant \$50 on account of her solicitor's fees, and the motion as to the temporary alimony was continued. Later, upon a hearing of this motion, the chancellor entered the following order:

"The court having heard the sworn testimony in support of a motion for temporary alimony and solicitors fees and having read the sworn affidavit of the cross complainant Myrtle Landis doth find that the complainant Joseph Munch is a man 76 years of age; that he is the owner of 20 acres of land; that the only income received by said complainant

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1. The first group of people who are interested in the study of the history of the world are the historians. They are people who study the past and try to understand what happened and why it happened. They use a variety of sources, including books, documents, and artifacts, to reconstruct the past. They also try to understand the people who lived in the past and how they thought and felt. Historians are interested in the history of the world because it helps them to understand the present and the future.

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Approved by the undersigned on this 11th day of January 1900.

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Florida's new statute will be effective July 1, 1997. The statute will have no effect

7-10-68

Joseph Munch is \$150.00 a year from which he is compelled to pay taxes, that the parties in the above entitled cause were married on June 13, 1927 and separated August 13, 1927; that said Joseph Munch has no other income other than the \$150.00 rental from said 80 acres. It is therefore ordered, adjudged and decreed that the motion for temporary alimony be and the same is denied, and * * * that the complainant Joseph Munch pay to the defendant the additional sum of \$50.00 solicitors fees."

The appellant has appealed from this order.

On the hearing certain oral testimony was introduced by the appellant, but the material facts upon which she bases her motion are set forth in her affidavit filed in support of the motion. The material parts of the affidavit, so far as this appeal is concerned, are as follows:

"Affiant further says that she is fifty years of age and that prior to her marriage to said Joseph Munch she was in good health and was employed as a practical nurse * * * that immediately after the filing of said petition as aforesaid Joseph Munch proceeded to terrorize affiant, to use vile and opprobrious language toward her and to threaten her with bodily harm and demanded that she leave him, all to such an extent that on a number of occasions she did not remove her clothes at night and was unable to sleep at all; that because of said acts as aforesaid she became in a very excited and highly nervous condition and otherwise ill; that she weighed one hundred and four (104) pounds at the time of said marriage and eighty-nine (89) pounds at the time of said separation and now weighs ninety (90) pounds; * * * that she has no property, money or income whatsoever; that because of her present ill health she is unable to accept employment and is subjected to the charity of her relatives who are keeping her and that she has no funds to employ solicitors to defend her in the action brought by said Joseph Munch, and that her solicitors have received nothing for the services which they have rendered her or on account of the services to be rendered her; that said Joseph Munch is in good physical health and in an exceptionally vigorous condition for a man of his age; that he resides on twenty acres of land which is owned by him in fee simple free and clear of mortgages, adjoining the Village of Palos Park, said land being located near 123rd Street and Keene Avenue, Cook County, Illinois, and being improved with a seven room house where Joseph Munch resides; * * * that she has made inquiry respecting the value of said land and is informed and verily believes that it is reasonably worth \$2500 per acre; that said Keene Avenue is being improved as a thorough highway from Chicago, Illinois, to Joliet, Illinois; that said land is comparatively near the City of Chicago and adjoining Palos Park, a suburb of Chicago and adjoining a Cook County Forest Preserve so that it has a large market value for

[illegible][illegible][illegible]

subdivision purposes; * * * that said Joseph Munch informed her on a number of occasions at the time of said marriage and immediately thereafter that he had been offered \$2000 per acre for said land but had refused to accept the same as it was an inadequate price; that he had sufficient funds to live upon the rest of his life and that it was not necessary for him to sell said land; * * * that Joseph Munch leased approximately one acre of land for an oil station and affiant is informed and verily believes that he receives One Hundred and Fifty Dollars (\$150) annual rental therefor; * * * that during their married life said Joseph Munch always had funds, continually keeping from One Hundred Dollars (\$100) to Two Hundred Dollars (\$200) on his person which money he exhibited at various times to her when he gave her funds to purchase food and your affiant verily believes that said Joseph Munch has funds and property of which she has no knowledge other than that set forth herein which he refuses to disclose."

The appellee did not file any affidavit in opposition to the motion of the appellant, nor did he offer any evidence at the time of the hearing of the motion.

The appellant contends that the order of the chancellor denying temporary alimony to the appellant was an abuse of discretion. The record shows that the chancellor based his order denying temporary alimony upon the theory that the only thing that he could consider in respect to the real estate belonging to the appellee was the fact that it produced an rental \$150 a year, and the question before us is, did the chancellor err in his view of the law.

Temporary alimony and solicitor's fees are not allowed as a matter of right, but rest in the sound discretion of the court, dependent on the inability of the appellant to provide for herself and pay the expenses of the litigation, and upon the ability of appellee to do so. The discretion is to be exercised in view of the conditions of the parties and the circumstances of the case. The appellant, in her affidavit, makes a clear showing as to her inability to provide for herself and to pay the expenses of the litigation. According to the uncontradicted evidence in

the case the appellee is the owner of unincumbered real estate near the city of Chicago, worth \$50,000, and for which the appellee has declined, on a number of occasions, \$40,000 for the reason that he considered the amount offered inadequate. "It is not the law that the principal of an unproductive estate may not be charged for the production of suitable allowances. Bergen v. Bergen, 22 Ill. App. 190; Parker v. Parker, 61 Ill. 372." (Low v. Low, 133 Ill. App. 618, 619.) In Besser v. Besser, 32 Ill. 442, 445, the court said: "Nor is it an answer to say that one, by the decree, would get a third of the rents and profits arising from the property. The court is not bound by such considerations, but may look to what the property is capable of yielding. Converted into money, it could be made to yield a much larger sum." In Bergen v. Bergen, *supra*, it is said: "Although it is usual to regard the income of the delinquent husband as the fund out of which alimony is to be decreed, it is by no means universal. A portion of the estate may be decreed. In the case of Kursler v. Kursler, 5 Pickering 427, the court went beyond the income of the husband and ordered a sale of the delinquent husband's estate. In all cases, the court will look to the extent of the delinquency, amount of property," etc. In Parker v. Parker, *supra*, it is said: "The court only decreed that he should, in discharge of a legal duty, pay a certain sum every three months to defendant in error. It does not order him to labor to earn it. He is left at liberty to raise the means by the sale of his personal property or real estate, or produce it from his regular pursuits, as may suit his inclination or his interest. * * * It can not be that the court would have no power to decree alimony in money, simply because the defendant has no productive property." In Harding v. Harding, 144

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Ill. 538, 600-1, the rule is recognized that the chancellor may enter an order providing for the actual wants and necessities of the wife, even if the payment of the allowance will result in diminishing the estate of the husband.

The appellee has cited the following cases in support of the order entered by the chancellor: Arado v. Arado, 281 Ill. 123; Low v. Low, *supra*; Lane v. Lane, 22 Ill. App. 529. None of these cases holds contrary to the rule laid down in the cases we have cited. The major argument of the appellee appears to be this, that while the value of the real estate of the appellee might be considered by the chancellor on a final decree, it should not be considered on a motion for alimony pendente lite. No authorities are cited in support of this position and it is sufficient to say in answer to the same that several of the cases we have quoted were appeals from orders for alimony pendente lite. If the position of the appellee were the law a husband might be the owner of very valuable non-productive real estate in the city of Chicago and yet if he had no income other than an amount actually necessary to support himself he could escape the payment of alimony pendente lite although the wife be destitute. It would be a serious reflection upon courts of equity if such a rule were followed.

The appellant also complains that the amount allowed her for solicitor's fees was inadequate. We do not deem it necessary to pass upon this contention, as the chancellor has the power to make further allowances, from time to time, for solicitor's fees, as the circumstances of the case may warrant.

The error of the chancellor was not an abuse of discretion, as contended for by the appellant, but it resulted from a mistake of law, and as the appellant was seriously injured by the action of the chancellor, the order of the Circuit Court of Cook County is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

32785

A. NADLER,
Defendant in Error,

v.

MOTOR CAR SERVICE COMPANY,
Plaintiff in Error.

APPEAL TO MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A. Nadler, plaintiff, sued the Motor Car Service Company, defendant, in the municipal court of Chicago in an action in tort for damages to an automobile owned by the plaintiff. A trial was had before the court without a jury. The court found the defendant guilty and assessed the plaintiff's damages at the sum of \$150. Judgment was entered on the finding and this writ of error followed. The plaintiff has not filed a brief in this court.

The plaintiff's statement of claim alleges that on August 5, 1927, while his automobile was being driven with due care and caution in a southerly direction on Wabash avenue, near 32nd street, the defendant, by its agent or servant, so recklessly, carelessly and negligently operated its automobile that it collided with the automobile of the plaintiff and damaged it, and the plaintiff sued to recover damages for repairs to his automobile "and for loss of use of his automobile while repairs were being made."

The defendant contends that the action of the court in finding the defendant guilty is not supported by the record. After a careful consideration of the evidence, we are satisfied that the instant contention cannot be sustained.

The defendant further contends that the damages assessed

by the court were excessive. This contention is a meritorious one. The plaintiff proved that he paid \$64 for repairs to his car, made necessary by the accident, and the evidence tends to show that \$64 was a reasonable charge for the repairs made. The plaintiff is entitled to that amount, but no more. The difference between \$64 and \$150, the amount allowed by the court, appears to have been allowed upon the theory that the plaintiff lost commissions on sales that he might have made if he had not been deprived of the use of the automobile during the few days that it was being repaired. Such alleged damages are, of course, purely speculative and should not have been allowed by the court.

Several other contentions are raised by the defendant, but in the view that we have taken of this case it is entirely unnecessary to consider these.

Under the law and the evidence the plaintiff is entitled to recover \$64 only. Therefore, if the plaintiff will within ten days file a remittitur of \$86, the judgment will be affirmed for \$64, otherwise the judgment will be reversed and the cause remanded.

AFFIRMED UPON REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

by the court were necessary. This complaint is a continuation of the
 The Plaintiff proved that he had lost his papers in his car, and
 necessary by the Plaintiff, and the evidence shows that he had
 was a reasonable charge for the recovery of the same. The Plaintiff is
 entitled to that amount, but no more. The Plaintiff's recovery is
 and \$100, the amount claimed by the Plaintiff, and the court has
 allowed upon the theory that the Plaintiff had established an issue
 that he might have been if he had not been deprived of the use of the
 automobile during the two days that it was being repaired. The
 alleged damages are, of course, purely speculative and cannot be
 have been allowed by the court.

Several other questions are raised by the testimony, and
 in the view that we have taken of this case it is entirely unnecessary
 to consider these.

What the law and the testimony and Plaintiff is entitled to
 recover is only. Therefore, if the Plaintiff will please pay over
 the \$100.00 to the Plaintiff, the judgment will be entered for the Plaintiff.
 also the judgment will be entered for the Plaintiff.

WITNESSED MY HAND AND SEAL OF THE COURT AT
 ST. LOUIS, MISSOURI, THIS 10TH DAY OF MAY, 1934.

Only \$100.00 and \$100.00, and \$100.00.

32794

H. JAMES ROSSIER and C. BROOKS
MIDDLETON, copartners, doing
business as Middleton & Rossier,
Appellees,

v.

DONCHIAN FURNITURE COMPANY,
a corporation,
Appellant.

7017a
250 I.A. 649²
APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

H. James Rossier and C. Brooks Middleton, copartners, doing business as Middleton & Rossier, plaintiffs, sued the Donchian Furniture Company, a corporation, defendant, in the Superior Court of Cook County in an action of assumpsit. The case was tried before the court with a jury and there was a verdict returned finding the issues for the plaintiffs and assessing their damages at the sum of \$786.77. Judgment was entered on the verdict and this appeal followed.

The declaration consisted of the common counts. The affidavit of claim of the plaintiffs stated that the claim was "for services and labor, material and merchandise, art work, literary ideas, literary property, advertising services in preparing copy, submitting plans, preparing advertising material and delivery of same to defendant at his special instance and request and, part of same to the above amount used by defendant, to-wit, in the sum of \$1000.00." We find from the proof that the plaintiffs operated an advertising agency and supplied advice, art work, literary ideas, advertising copy, layouts and drawings to the defendant, to be used by the latter for newspaper advertising in

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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 envelope. It is stamped on the back of the envelope and
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 American Republics Company, a commercial enterprise in the
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 delivery business at Kansas City, Missouri, and the

defendants, as was done by the United States Attorney in the case of United States v. [redacted]. In that case the United States Attorney requested the defendant to produce the documents and records in his possession, custody or control, and to permit the United States Attorney to inspect and copy the same. The defendant refused to do so, and the United States Attorney moved for an order compelling the defendant to produce the documents and records, and to permit the United States Attorney to inspect and copy the same. The court granted the motion, and the defendant was ordered to produce the documents and records, and to permit the United States Attorney to inspect and copy the same. The defendant failed to comply with the order, and the United States Attorney moved for an order of contempt. The court granted the motion, and the defendant was found in contempt of court.

its retail furniture business; that the defendant used the service, materials, etc., of the plaintiffs in connection with certain advertisements that it published in the Chicago Tribune.

The defendant contends that the plaintiffs are limited in their recovery under the pleadings to the actual labor performed and material delivered, if any. The correctness of this proposition of law may be conceded. Applying this rule we find that the plaintiffs would be entitled to \$240.54 under the proof. The defendant, especially in the oral argument, does not seriously dispute this amount.

The defendant contends (1) that the plaintiffs cannot recover damages under the common counts for breach of a special contract, and (2) that the amount of the verdict over and above \$240.54 was allowed by the jury for breach of a special contract. Contention (1) is, of course, a meritorious one. Contention (2) appears also to be justified by the proof. In fact, the plaintiffs admit that "the balance of \$445 was allowed by the jury for the 'piracy' in destroying the ideas so that they could not be used by another firm in the same line of business." Under the law and the evidence the plaintiffs are entitled to recover \$240.54, but no more. Therefore, if the plaintiffs will within ten days file a remittitur of \$546.23, the judgment will be affirmed for \$240.54, otherwise the judgment will be reversed and the cause remanded.

AFFIRMED UPON REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

the retail furniture business and the defendant used the services,

materials, etc., of the plaintiff in connection with certain

advertisements that it printed in the Chicago Tribune.

The defendant contends that the plaintiff was liable in

their recovery under the provisions of the actual label provision and

material delivered, it says. The defendant of this provision at

first may be considered. The defendant also says that the plaintiff

would be entitled to \$100.00 under the first. The defendant, however,

in the first argument, does not seriously dispute this claim.

The defendant contends (1) that the plaintiff's recovery should

be based upon the amount of the purchase of a special contract, and

(2) that the amount of the purchase of the goods sold by the plaintiff

by the first for a special contract. The defendant (1) says that

section, a provision that, according to the defendant, is to be applied

by the court. In fact, the plaintiff's claim that "the balance of \$100

was allowed by the first for the 'first' in connection with the claim for

that they could not be used as evidence that in any case they

are not." That the law has been applied the plaintiff has not

to recover \$100.00, but no more. Therefore, if the plaintiff will

within ten days file a petition for \$100.00, the judgment will be

affirmed for \$100.00. Otherwise the judgment will be reversed and the

case remanded.

THE COURT OF APPEALS
HAS REVERSED THE JUDGMENT.

32804

HAWKINS & LOOMIS CO.,
a corporation,
Appellee,

v.

ISAAC GITTLER,
Appellant.

7018a
250 L.A. 649³
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MCANULTY DELIVERED THE OPINION OF THE COURT:

In the Municipal Court of Chicago, in an action in contract, Hawkins & Loomis Co., a corporation, plaintiff, sued Isaac Gittler, defendant. A jury was waived and the cause was submitted to the court, and the issues were found against the defendant and the plaintiff's damages were assessed at the sum of \$175. Judgment was entered on the finding and this appeal followed.

The plaintiff's claim was for the value of work done and materials furnished in the printing of abstracts and briefs in Charles J. Harney v. Charles Hallgren, a suit for specific performance then pending on appeal in the Supreme Court. No question was raised in the instant case as to the amount of the plaintiff's claim. The printing was ordered by George W. Plummer, solicitor for Harney, and the sole defense is that Plummer had no authority to act for Gittler in the matter of the printing of the abstracts and briefs.

The defendant contends (a) that the plaintiff failed to make out a prima facie case, and (b) that the plaintiff failed to establish its case by a preponderance of the evidence. After a careful examination of the evidence we are satisfied that neither of these contentions can be sustained.

1210

WILLIAM A. BROWN, JR.,
a corporation,
-Plaintiff-

vs.
JAMES W. BROWN,
-Defendant-

1. That the defendant is a resident of the County of Los Angeles, State of California;

2. That the plaintiff is a corporation organized under the laws of the State of California, and is a resident of the County of Los Angeles, State of California; and

3. That the plaintiff is a corporation organized under the laws of the State of California, and is a resident of the County of Los Angeles, State of California;

4. That the defendant is a resident of the County of Los Angeles, State of California;

5. That the plaintiff is a corporation organized under the laws of the State of California, and is a resident of the County of Los Angeles, State of California;

6. That the defendant is a resident of the County of Los Angeles, State of California;

7. That the plaintiff is a corporation organized under the laws of the State of California, and is a resident of the County of Los Angeles, State of California;

8. That the defendant is a resident of the County of Los Angeles, State of California;

9. That the plaintiff is a corporation organized under the laws of the State of California, and is a resident of the County of Los Angeles, State of California;

10. That the defendant is a resident of the County of Los Angeles, State of California;

11. That the plaintiff is a corporation organized under the laws of the State of California, and is a resident of the County of Los Angeles, State of California;

12. That the defendant is a resident of the County of Los Angeles, State of California;

13. That the plaintiff is a corporation organized under the laws of the State of California, and is a resident of the County of Los Angeles, State of California;

14. That the defendant is a resident of the County of Los Angeles, State of California;

15. That the plaintiff is a corporation organized under the laws of the State of California, and is a resident of the County of Los Angeles, State of California;

The defendant also contends that the plaintiff failed to establish, by a preponderance of the evidence, the authority of Plummer to act for Gittler in the matter of ordering the printing of the briefs and abstracts. We find no merit in this contention. The evidence shows that Gittler authorized the filing of the chancery suit in question; that the complainant, Harney, had no interest in the suit and that he was a mere "dummy for Mr. Gittler," who was the real party interested in the property involved in the proceeding. Thomas A. Harney, a brother of the complainant in the chancery suit, authorized Mr. Plummer to start the suit, and when the bill in that case was dismissed for want of equity, in the Circuit Court, said Harney ordered Plummer to take the necessary steps for an appeal to the Supreme Court. The evidence shows that Thomas A. Harney, in all that he did in connection with the chancery case, was acting as the representative of the defendant, Gittler. In fact, the proof shows that the defendant, in the chancery proceeding, admitted that Thomas A. Harney was his representative. The decision of the Supreme Court on the appeal was adverse to the complainant, and we are satisfied that the defendant in the instant suit is now seeking to evade the payment of his just debt.

The defendant contends that "this suit was brought against appellant and two others; statement of claim refers to one contract, joint and several as to all defendants. During trial the case was dismissed as to two defendants and judgment entered against appellant only. No amended statement of claim was filed. Motion in arrest of judgment should have been allowed." The plaintiff's action was commenced against Isaac Gittler, Charles J. Harney and Thomas A. Harney. Summons was issued as to the three defendants but service

was had only as to Isaac Gittler, and on motion of the plaintiff the suit was dismissed as to Charles J. Harney and Thomas A. Harney. The plaintiff's statement of claim alleged (inter alia) "that its claim is for the reasonable and market value of materials furnished, and services rendered by the plaintiff at the special joint and several instance and request of said defendants, the said materials, dates of delivery, and reasonable market prices therefor which the defendants and each of them agreed to pay appearing on the statement attached marked 'Exhibit A' and made a part hereof; that said services and materials were accepted by the defendants and each of them and that said defendants jointly and severally promised to pay therefor the sum of \$162.55." The point made by the defendant involves a matter of variance merely. The following language of the Supreme Court in the case of Mayer v. Brensinger, 180 Ill. 110, is applicable to the present contention:

"Although the declaration remained as a declaration charging a joint liability against the two defendants, yet this was a matter of variance merely. The proof showed that only one defendant was liable. The declaration averred that both were liable. Appellant should, therefore, have moved to exclude the evidence on the ground of a variance; but he did not do so. If the objecting party desires to raise the question of variance, he must indicate it specifically in his objection, and point out in what it consists, so as to enable the court to pass upon the question intelligently, and also so as to enable the plaintiff to amend the pleadings to make them conform to the evidence. If the objection had thus been pointed out, the appellee may have amended his declaration immediately, subject to such terms as the court may have seen fit to impose. (Lake Shore and Michigan Southern Ry. Co. v. Ward, 135 Ill. 311; Probst Construction Co. v. Foley, 166 id. 31.)"

In the trial of the instant case the defendant did not raise the question of variance. In fact, he does not raise that question in the assignment of errors. The action was dismissed as to Charles J. Harney and Thomas A. Harney, and there was no evidence of joint liability introduced. It will be noted that the statement of claim alleges "that its claim is for the reasonable and market value of

materials furnished, and services rendered by the plaintiff at the special joint and several instance and request of said defendants, the said materials, dates of delivery, and reasonable market prices therefor which the defendants and each of them agreed to pay appearing on the statement attached marked 'Exhibit A' and made a part hereof; that said services and materials were accepted by the defendants and each of them and that said defendants jointly and severally promised to pay therefor the sum of \$162.55." (Italics ours.) The charge in the statement of claim of a joint promise may therefore be rejected as surplusage. (See Schlatter v. Triebel, 208 Ill. App. 504; Euterbaugh's Com. Law Plead. & Prac., 10th Ed., p. 354.) The present contention is clearly an afterthought and is without merit.

The judgment of the Municipal Court of Chicago should be and it is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

32838

WILLIAM R. JOHNSTON,
Appellant,

v.

HOWARD G. SHOCKEY,
Appellee.

7019a
250 I.A. 649⁴
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, in a fraud and deceit action, William R. Johnston, plaintiff, sued Howard G. Hockey, defendant. The first statement of claim of the plaintiff was stricken from the files, on motion of the defendant, and leave was given the plaintiff to file an amended statement of claim. Thereafter an amended statement of claim was filed, which statement, on motion of the defendant, was stricken from the files, whereupon the plaintiff elected to stand by the amended statement of claim and thereupon the trial court dismissed the suit and entered judgment against the plaintiff for costs. This appeal followed. The defendant has not filed a brief in this court.

Plaintiff's amended statement of claim is as follows:

"Plaintiff alleges that on or about the 18th of May, 1926, he was the owner of and entitled to the benefits of a membership in the Medinah Country Club, an Illinois corporation, which said membership was known as a resident membership; that on or about that day he applied to said club for a perpetual membership therein, and that the said defendant came to him and stated that he was the representative and agent of said club, and that he came for the purpose of inducing the plaintiff to trade his resident membership for a perpetual membership.

Plaintiff further alleges that the said defendant stated and represented to him at the time of the trade of

... ..

said resident membership for said perpetual membership, that said perpetual membership was worth Thirty two hundred dollars (\$3200.00), and that the Medinah Country Club owned in fee simple all the land bounded on the North by Irving Park Blvd., on the West by Medinah Road, on the South by Lake Street and on the East by a certain boundary line which was then existing, separating the East and adjoining property, and that there were no mortgages against said land or any part thereof, when in truth and in fact said perpetual membership at said time and place was worth less than Two thousand dollars (\$2000.00), or approximately Fourteen hundred and fifty dollars (\$1450.00), and that said land was not owned in fee simple, and that there was a mortgage against the North portion of said land of approximately Eighty thousand dollars (\$80,000.00), and that the South portion thereof was held by the Chicago Title & Trust Company.

Plaintiff further alleges that he believed the said representations of the defendant that said perpetual membership was worth Thirty two hundred dollars (\$3200.00) and that the Medinah Country Club owned in fee simple all the land bounded on the North by Irving Park Blvd., on the West by Medinah Road, on the South by Lake Street and on the East by a certain boundary line which was then existing, separating the East and adjoining property, and that there were no mortgages against said land or any part thereof, and that he relied upon said representations as made by said defendant and that said representations were material; that at the time the said representations were made by said defendant, the said defendant knew that said representations were false, fraudulent, untrue and deceitful, and that the said defendant made said representations to plaintiff with the intention of deceiving the said plaintiff and including said plaintiff to trade said resident for said perpetual membership, and for the purpose of obtaining the moneys of said plaintiff by virtue of said false, fraudulent, untrue and deceitful representations.

Plaintiff further alleges that the defendant stated and represented to him that the said club would not pay him any commission on the trade of said resident membership for said perpetual membership at that time, or at any future time, and notwithstanding this representation, the defendant collected from the said Medinah Country Club a commission of One hundred and seventy five dollars (\$175.00); that said representation was a material representation, and said representation was false, fraudulent, untrue and deceitful and was made for the purpose of inducing the plaintiff to trade said resident membership for said perpetual membership; that the plaintiff relied upon said representation and acted upon the same; that the defendant knew at the time that he made said representation that said representation was false, fraudulent, untrue and deceitful, and that said representation was made by said defendant with the intention of obtaining the money and property of the plaintiff by virtue of said false, fraudulent,

untrue and deceitful representation.

Plaintiff further alleges that it was the duty of the defendant to refrain from making said false, fraudulent, untrue and deceitful representations, yet the defendant, wholly disregarding said duty, did willfully, intentionally, knowingly, falsely, fraudulently and deceitfully make the representations heretofore alleged, knowing them to be false and untrue and knowing full well that he, the said defendant, was to receive a commission of ten percent (10%) of all moneys derived from the trade of said membership, and knowing full well that the said defendant had a contract with the Medinah Country Club for a commission of ten percent (10%) on money derived from said trade, and that the said perpetual membership of the said Medinah Country Club was not worth \$3200.00, but in truth and in fact was only worth approximately Fourteen hundred and fifty dollars (\$1450.00) and said land was not owned in fee simple, and that there was a mortgage against the North portion of said land of approximately Eighty thousand dollars (\$80,000), and that the South portion thereof was held by the Chicago Title & Trust Company, yet, notwithstanding these facts, the said defendant willfully, fraudulently and deceitfully made said representations to the damage of the plaintiff.

Plaintiff further alleges that at the time the said false, fraudulent, untrue and deceitful representations were made to him, that the resident membership in said Medinah Country Club was worth Fourteen hundred and fifty dollars (\$1450.00), and that said perpetual membership, if said false, fraudulent, untrue and deceitful representations made by defendant to plaintiff had been true, would have been worth thirty two hundred dollars (\$3200.00).

Wherefore the said plaintiff became and was damaged in the difference between said \$1450.00, the value of said perpetual membership at the time and place of said trade, and what the same would have been worth if the said false, fraudulent, untrue and deceitful representations had been true.

Wherein and whereby the plaintiff was damaged in the sum of One thousand dollars (\$1000.00), wherefore plaintiff brings his suit, etc." (Italics ours.)

The plaintiff contends that "a good cause of action is set out if the statement of claim contains the following elements with reference to the representations which constituted a fraud, to-wit:

1. Its form must be a statement of fact. 2. It must be made for the purpose of influencing the other party to act. 3. It must be untrue.
4. The party making the statement must know or believe it to be untrue. 5. The person to whom it is made must believe and rely on the statement. 6. The statement must be material." This is not a full statement of the essential elements. In a case of fraud and

deceit "the elements of a cause of action of this character are representation, falsity, scienter, deception and injury. (Foster v. Oberreich, 230 Ill. 525.) The bill must show on its face, first, that the defendant has made a representation in regard to a material fact; second, that such representation is false; third, that such representation was not actually believed by defendant, on reasonable grounds, to be true; fourth, that it was made with intent that it should be acted on; fifth, that it was acted on by complainant to his damage; and sixth, that in so acting on it the complainant was ignorant of its falsity and reasonably believed it to be true." (Italics ours.) (Bouxsein v. Granville Nat. Bank, 292 Ill. 500, 502.) (See also Billetron v. The Triple Tread Tire Co., 220 Ill. App. 550; Steven v. Combination Fountain Co., 231 Ill. App. 360, 365.) Many other cases to the same effect might be cited. In order to make out a good cause of action, in the amended statement of claim, it was therefore necessary to allege that the plaintiff acted on the false representations to his damage.

While plaintiff's appeal is predicated upon the theory that his amended statement of claim makes out a prima facie case without an allegation that he acted upon the false representations, nevertheless, we have carefully examined the statement for the purpose of determining if it contains sufficient allegations to make out a prima facie case in that regard. In the amended statement of claim above quoted we have italicized all portions of the same that could have any possible bearing on the present question. In our judgment the amended statement of claim does not allege that the plaintiff actually traded his resident membership in the Medinah Country Club for a perpetual membership in the same, and we think the trial court was justified in sustaining the

motion to strike the amended statement of claim from the files. Plaintiff had the right, if he so desired, to file a second amended statement of claim, but he did not see fit to do so.

The judgment of the Municipal Court of Chicago will be affirmed.

AFFIRMED.

Gridley, F. J., and Barnes, J., concur.

motion to strike the amended petition for relief from the estate
plaintiff has the right, it is so held, to file a petition amended
statement of claim, but he has not done so in this case.
The judgment of the district court is affirmed and the case
dismissed.

REMARKS.

Delivered by the court, 11th day of January, 1904.

32562

DENNEY & CO., a Corporation,

Appellant,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,
a Corporation,

Appellee.

7024
250 I.A. 649

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Dec. 19, 1928

MR. JUSTICE RYMER delivered the opinion of the court.

This cause comes here for review upon an appeal from a judgment of the Municipal Court of Chicago in favor of the defendant, Illinois Central Railroad Company. The judgment was upon a directed verdict.

The plaintiff filed a verified statement of claim consisting of three counts, in each of which it charged, in substance, that it was the lawful holder of a bill of lading for a shipment of grapefruit, shipped from Clearwater, Florida, to Chicago, Illinois; that the defendant was a common carrier of goods for hire; that the goods were in good condition when delivered to and accepted by the defendant for transportation; that the defendant accepted said goods for transportation and agreed to transport and deliver them safely, promptly, with reasonable dispatch, and in good condition, but that the defendant so carelessly and negligently behaved with respect to said goods that some of them were wholly lost to the plaintiff, and others greatly damaged and lessened in value.

The affidavit attached to the statement of claim contained a statement that the cause was a suit upon a contract for the payment of money, and that the total amount due was \$571.31.

In its affidavit of merits the defendant stated its defense to the first count of the statement of claim to be, that it was a connecting carrier only of the shipment, having contracted to transport it between Birmingham, Alabama, and Chicago, Illinois; that it transported said shipment safely and promptly and tendered it for delivery to the consignee in the same condition in which it was when received by the defendant, except for damage due to certain causes, the consequences of which the defendant in the exercise of care, could not prevent, and, except for the acts and omissions of the consignee in causing the shipment to be diverted at Chicago, Illinois, and not to be promptly accepted.

The defense to the second count of the statement of claim was, in substance, the same as the defense to the first count except that no charge of diversion of the shipment or failure to promptly accept was made.

In its defense to the third count, the defendant stated that it was a connecting carrier only for the purpose of transporting the shipment in question between Birmingham, Alabama, and Chicago, Illinois; that it transported the shipment safely and promptly; that the damage and loss, if any, to the shipment did not occur on the line of the defendant or while the shipment was in its possession, and that there had been an accord and satisfaction of the claim as to all packages

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It is the intention of the Government to deliver the goods to the consignee in the time specified in the bill of lading, and to receive from the consignee the amount of the freight and charges thereon. It is the intention of the Government to deliver the goods to the consignee in the time specified in the bill of lading, and to receive from the consignee the amount of the freight and charges thereon.

14-00000

[illegible]

in broken condition.

The first ground urged by the plaintiff for a reversal of the judgment is that the Municipal Court erred in granting leave to the defendant to amend its affidavit of merits on the face without further verification and, that the amending of the affidavit of merits on its face in this manner had "the effect of vitiating the original affidavit of merits" and rendering "the unsworn amendment void." This contention is wholly without merit. There was no order entered granting leave to amend. Furthermore, the amendment complained of was never made. The amendment not having been made, the defendant would not be in a position to complain even if an order had been entered of record granting leave to amend. The Wisconsin Central Railroad Company v. Wiczorek, 151 Ill. 579.

The plaintiff also contends that because the affidavit of merits was verified by an agent of the defendant, while the statement of the nature of the defense purported to be that of the defendant itself, the affidavit was void, citing Cohen v. Flaxman, et al., 232 Ill. App. 240. The authority cited does not hold that such an affidavit is void, but holds that a motion to strike it should be sustained. The plaintiff made no such motion and, by proceeding to trial without availing itself of this right, it waived the defect.

On the trial of the case, the plaintiff introduced testimony showing, or tending to show, delay and damage to the goods at the point of destination in respect to each of the three shipments in question. It then offered in evidence what purported to be the original bills of lading covering the three

shipments. The court sustained an objection and refused to admit them in evidence. At this point in the trial the plaintiff rested its case. The defendant offered no evidence. Thereupon, the court instructed the jury to find the issues for the defendant.

It is contended on behalf of the plaintiff that the bills of lading were sufficiently identified as the original bills covering the shipments in question and that they should have been admitted in evidence. It is further contended that if the court was right in excluding this evidence, nevertheless, the plaintiff made out a case sufficient to render the defendant liable in tort for negligence.

The latter contention is untenable for two reasons. In the first place, the plaintiff in its statement of claim declared upon a contract for the payment of money, and it urges in this court that such was the nature of the action. In the second place, without the bills of lading in evidence, the record is barren of any evidence of the condition of the goods, either when delivered to the initial carrier, or when delivered to the defendant.

The bills of lading offered by the plaintiff recite that the goods were received in apparent good order, and purport to have been issued by the Tampa & Gulf Coast Railroad Company. In each, the goods are described as 360 Boxes Grapefruit. The defendant admits receiving and transporting the goods, two of the shipments as the last carrier and the other as an intermediate carrier, but contends that there is not sufficient competent evidence in the record to identify the particular

Thereafter, the report described the fact that the
 plaintiff never left the house. The defendant claimed no witness,
 and that the plaintiff was not in the house at the time the
 defendant was arrested. The report concluded that the plaintiff
 was not in the house at the time the defendant was arrested.

1) In accordance with the provisions of the law on the
rights of the child, the child is to be placed in the
care of his parents or other persons who are able to
provide for his needs and to ensure his proper
development. If the child is not in the care of his
parents or other persons, the child is to be placed
in the care of the State or other persons who are
able to provide for his needs and to ensure his
proper development.

The latest document is submitted as evidence in the case of the two witnesses.

[illegible]

documents as the original bills of lading covering the shipments in question.

Christensen, a witness for the plaintiff, testified that at the time the shipments were made, he was vice-president and traffic manager of the plaintiff; that all the traffic end of the transaction was attended to by him, or by others working under his supervision, and that he obtained the original bills of lading and mailed them to the freight claim department of the defendant. His testimony with reference to the bills of lading was admitted over objection.

The same witness was later recalled and was interrogated by the attorney for the plaintiff as to whether he was correct in his belief that the witness had testified that Plaintiff's Exhibits Number 25 to 27 inclusive, being the identification numbers of the bills of lading offered in evidence by the plaintiff, were the ones on which the witness testified that the defendant delivered the cars. The attorney for the defendant objected on the ground that he did not believe that the witness had so testified. The attorney for plaintiff replied that the witness had answered in the affirmative and without objection. The court said that he thought that the witness answered before, and ruled that it should stand.

The witness, McGlinn, testified that he was a licensed attorney and that in 1924 and 1925 he was employed by the plaintiff; that on the morning of the day he testified he asked Mr. Oliver, representing the defendant, for bills of lading covering Car F. G. E. 35, 189 and S. F. R. D. 20,764, and received in return documents marked Plaintiff's

documents on the original bills at issue covering the entire
month in question.

Thereafter, a witness for the plaintiff, furnished
that at the time the documents were made, he was vice-president
and chief manager of the plaintiff, that all the receipts
and all the disbursements were prepared by him, or by others
acting under his supervision, and that he examined the
original bills at issue, and noted them in the ledger, and
submitted to the defendant, and delivered to the defendant
in the bills at issue was advised that objection.

The same witness was later recalled and was asked
whether by the plaintiff for the defendant as he was not
was entered in his books and the witness had recalled
that the plaintiff's witness under the act of January, being the
identification number of the bills at issue, entered in
evidence by the plaintiff, were the same as those the witness
recalled that the defendant delivered the bills, the witness
for the defendant objected as the ground that he did not
believe that the witness was a witness. The witness for
plaintiff replied that the witness was present in the action
and was a party to the action. The court said that he should
take the witness as a party, and that that is true.

Rebuttal.

The witness, recalled, testified that he was a
licensed attorney and that in 1914 and 1915 he was employed
by the plaintiff, that he was the owner of the car he testified
he used in 1914, representing the defendant. On June
of 1914, he testified that he, J. H. Lee and J. H. Lee,
and recalled in 1914, delivered to the defendant the

Exhibits 25 and 26 for identification. On cross-examination he testified that he requested of Oliver that he be given the bills of lading involved in two of the cars in controversy, mentioning them by car numbers. Finally, he testified that all he knew was that the plaintiff sent the bills of lading, or purported bills of lading to the defendant, and that they were returned to him that morning by Mr. Oliver.

The witness, Oliver, testified that he was a clerk in the freight claim department of defendant; that he took Plaintiff's Exhibits numbered 25 and 26 from the claim file of the defendant, but that he did not know from what source they came.

The defendant urges that the Municipal Court erred in permitting the witness, Christensen, to state his conclusion that Plaintiff's Exhibits 25 to 27 were the original bills of lading covering the shipments in question. But, of this the defendant cannot complain.

The motion of defendant to direct a verdict at the close of the plaintiff's case was in the nature of a demurrer to the evidence and governed by practically the same rules. A demurrer to the evidence waives all objections to the admissibility or competency of the evidence demurred to.

Southern Railway Co. v. Leinart, 107 Tenn. 635. See also;

Foster v. McDonald, 5 Ala. 376;

Washburn v. The Board of Commissioners of Shelby County, 104 Ind. 331;

Bechtel v. Marshall, 283 Ill. 486.

The defendant should have moved to strike from the record the objectionable testimony before submitting the case to the Court on its motion to direct a verdict. Bechtel v. Marshall, supra.

The rule above announced does not, however, foreclose the plaintiff from assigning as error the ruling of the Court in excluding the bills of lading. Washburn v. The Board of Commissioners of Shelby County, supra. The Court there said:

"We do not think that the fact that the appellee demurred to the appellant's evidence precludes him from availing himself of a ruling excluding competent evidence. To hold that a party by demurring to evidence may render unavailing a ruling, made against his adversary, excluding competent testimony, would work great injustice for, by so holding we should lay down a rule that would enable a defendant to secure erroneous rulings on the admission of evidence, and then, by demurring to the evidence admitted, deprive the plaintiff of the benefit of the rulings excluding evidence, however erroneous they might be, and however great the injury done to him by such rulings. The case is not at all like that of the demurring party asking a review of rulings upon the admission and exclusion of evidence, for he, by his own act, submits the cause for decision upon the evidence received by the court, and thus impliedly waives all questions upon rulings made in the course of the trial, but his adversary does no affirmative act waiving rulings to which he has reserved proper and timely exceptions. If the rule were that the party compelled to join in the demurrer to the evidence waived all questions reserved upon rulings made in the course of the trial, then he would be completely at the mercy of his adversary and might be deprived, without any fault on his part, of the evidence upon which his case depended. We hold that a defendant who demurs to the evidence can not deprive the plaintiff of the right to make available questions upon rulings excluding evidence."

We think that a sufficient foundation was laid for the admission in evidence of the bills of lading and that the court erred in excluding them. They recite that the grapefruit was received by the initial carrier in apparent good order.

This, together with proof that the grapefruit was delivered at point of destination in a damaged condition by the defendant, was sufficient to place upon the defendant the burden of showing its freedom from negligence. Lino v. Northwestern Pacific R. R. Co., 246 Ill. App. 451; Freedman v. Erie R. Co., 246 Ill. App. 479.

For the foregoing reasons the judgment of the Municipal Court of Chicago will be reversed and the cause remanded.

REVERSED AND REMANDED.

HOLDOM, F.J. AND WILSON, J. CONCUR.

This, together with the fact that the property was destroyed
at point of departure in a damaged condition by the
defendant, was sufficient to prove that the defendant had
been guilty of causing the loss of the property. 1928 V.
HARRISON, LINDA A. HARRISON, and the defendant.
LINDA A. HARRISON, and the defendant.

For the reasons stated the judgment of the
District Court of Illinois will be reversed and the case
remanded.

REVEREND J. HARRISON

REVEREND J. HARRISON, J. HARRISON

32599

250 I.A. 650

DAGMAR FAYE,

Plaintiff-Defendant in Error,

v.

E.J. GROENWALD,

Defendant-Plaintiff in Error.

WRIT OF HABEAS CORPUS TO

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Dec. 19, 1928

MR. JUSTICE RYHER delivered the opinion of the court.

Plaintiff brought her action in tort in the Municipal Court of Chicago to recover damages for personal injuries sustained by being struck by an automobile owned and operated by the defendant.

The case was tried before the court, without a jury. The defendant offered no evidence, but at the close of the plaintiff's case moved the court to find in his favor. This motion was denied, and thereupon the court found the defendant guilty and assessed the plaintiff's damages at the sum of \$1,000.00. Motions for a new trial and in arrest of judgment were made and overruled. Judgment on the finding was then entered.

The foregoing rulings and actions of the court are here for review upon an appeal perfected by the defendant. It is contended on his behalf that the evidence wholly fails to show that he was in any respect negligent in the operation

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all to remain as described WITH INTENT.

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and the results are not negative in general, indicated all

(continued from page 6)

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It was not a random sampling of the country's population.

Example 1: Find the area of the shaded region. 100,000 ft²

will be visited by its parent. In some, but not all, cases

1987-1988

There will be no other new material.

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What effects would we see if we changed the number of

... ..

of his automobile but that the evidence does show that the plaintiff was not in the exercise of ordinary care for her own safety.

The plaintiff was the only witness to the accident who testified. Her son also testified, but only in reference to a conversation with the defendant the day after the accident.

The plaintiff testified that she was a widow sixty-one years of age, a housewife and a dressmaker; that on December 5, 1925, she went to market on Montrose Avenue near Ashland Avenue, in the City of Chicago, and on her return, was proceeding east across Ashland Avenue with her arms full of groceries; that there had been rain and sleet earlier in the day and there was some sleet at the time; that it was about six o'clock in the evening and the traffic was always congested there at that time so that a person had to be careful in crossing; that before she started to cross the street she looked both ways to see that the way was clear, but did not see any moving object or vehicle in any direction, so she started running across the street and had just about reached the curb on the opposite side of the street, when the defendant's automobile struck her and she was knocked to the pavement; that the automobile was coming from the south, going north, and that the accident happened so quickly that she just knew the car hit her and that was all; that she saw the automobile before it struck her, but only for an instant, and that she was rendered unconscious and remained so until she was in the hospital.

Her son testified that he talked with the defendant the day after the accident and that the defendant said that he was sorry the accident happened, but felt that it was not his fault;

at his automobile but that the witness does not know the
license was not in the custody of anyone else but was
lost.

The witness was the only witness in the vicinity
the accident. She was also testified, and only in relation
to a conversation with the defendant the day after the accident.

The witness testified that she was a nurse at the
year of age, a nurse and a physician, that on November 1,
1938, she was employed as a nurse at the hospital, and
in the City of Chicago, and on that evening, was returning
after a night's work with her car full of patients; that
there had been rain and that earlier in the day and there was
some light at the time; that it was about six o'clock in the
evening and the weather was cloudy, somewhat dark at that time
so that a person had to be careful in crossing that bridge and
started to cross the bridge and looked back over her shoulder
and saw a car, but did not see any person inside or outside it
any distance, so she started running across the street and had
just about reached the curb on the opposite side of the street,
when the defendant's automobile struck her and she was thrown
to the pavement; that the automobile was coming from the south,
going north, and that the accident happened at a point just
just past the car but that she did not see the car or the
automobile before it struck her, but only the car, and
that she was rendered unconscious and remained so until she was
in the hospital.

She was testified that she talked with the defendant the
day after the accident and that the defendant told her that
every day morning happened, but that it was not his fault.

that the weather conditions were bad and he did not see the plaintiff until she suddenly ran in front of him, just before he struck her; that when he saw her, he was too close to her to stop on account of the skiddy pavement, although he was going only at a rate of speed around seven miles an hour and stopped within a distance of a few feet, and that he did not hit her hard, but merely hit her foot or leg, the injuries she sustained coming from the fall.

The foregoing is all of the evidence in the record bearing upon the question of the liability of the defendant. An examination of it discloses that there was no proof whatever as to the manner in which the defendant was operating his automobile just before or at the time of the accident. There was no evidence that the head-lights of the automobile were not burning, or that the defendant failed in any respect to give warning of his approach, or that he was driving at a dangerous rate of speed. Likewise, there was no evidence that he violated any law, ordinance or traffic regulation.

The evidence raises some doubt as to whether the plaintiff exercised due care for her own safety. But even if we assume that she did, proof of the exercise of proper care on her part would not constitute sufficient ground upon which to predicate a finding that the defendant was negligent. She was required to prove the charge made in her statement of claim that the defendant carelessly and negligently operated his automobile. This she wholly failed to do.

The Municipal Court of Chicago should have found for the defendant and entered a judgment in his favor. The judgment of that court will be reversed and judgment entered here for the defendant.

REVERSED AND JUDGMENT HERE.

The following items at Chicago should have been included:

KIM HARRINGTON and wife - Judgment as per item. The judgment of this court will be reversed and judgment entered upon the

HARRINGTON and WILSON case.

32648

7026w 250 I.A. 650²

GENERAL HIGHWAYS SYSTEM, INC.,

Appellant,

PAUL POLKA AND MARTIN POLKA, in
business as POLKA BROTHERS,

Appellees,

GENERAL HIGHWAYS SYSTEM, INC.,

Appellant,

vs.

PAUL POLKA AND MARTIN POLKA, trading
as POLKA BROTHERS,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Dec. 19, 1928

MR. JUSTICE RYNER delivered the opinion of the
court.

The plaintiff instituted two suits before a police
magistrate. A change of venue was granted and the cases were
transferred to a justice of the peace. On the return day
both parties appeared and the cases were set for hearing for
October 4, 1927. On that day both parties again appeared and,
by agreement, the hearing of the cases was continued to
October 10, 1927. At the same time the defendant obtained
leave to file set-offs, which were filed two days later.

On the day set for the hearing neither party
appeared. In the Circuit Court the justice of the peace
testified that on that date he communicated with the parties,
and both said they were not ready for trial but would be
ready on the following day. The hearing was thereupon con-
tinued to October 11, 1927.

On October 11, 1927, no one appeared on behalf of the plaintiff. The defendant adduced evidence in support of its set-offs and the justice of the peace in each case found the issues for the defendant on the set-off and entered judgment against the plaintiff for \$300.00 and costs. Executions were issued and returned with a finding that the plaintiff had no personal property in the county sufficient to satisfy the judgment and costs, or any part thereof. Transcripts of the proceedings before the justice of the peace were then filed with the clerk of the Circuit Court of Cook County. Executions were thereupon issued by the clerk of that court and were served upon the plaintiff.

After the serving of the executions, the plaintiff filed its petitions with the clerk of the Circuit Court, praying that the executions be quashed on the ground that the justice of the peace was without jurisdiction to enter the judgments in question for the reason that no representative of the plaintiff appeared at the time appointed for the trial. The Circuit Court, upon stipulation of the parties, consolidated the cases for the purpose of hearing and appeal. The prayers of the petitions were denied and this appeal perfected by the plaintiff.

The sole point in controversy is the construction to be placed upon Section 2 of Article V of our statute relating to justices of the peace and constables, which reads as follows:

"If the plaintiff or his agent shall not appear at the time appointed for the trial, and no sufficient reason shall be assigned to the justice why such plaintiff or his agent does not appear, the justice shall dismiss the action, and the plaintiff shall pay the costs,

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The sole point in controversy is the determination of whether or not the defendant's conduct was negligent.

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The film's focus on the Olympics was not an exhibition of the
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"soft" of the Olympics of 1968.

unless the defendant shall consent that such action be continued to another day, but this section shall not require the dismissal of an action on a note or instrument of writing for the payment of money only, placed in the hands of a justice for collection."

This section was construed by this court in the case of Cunningham v. Wright, 37 Ill. App., 334. It was there held that it was mandatory upon the justice of the peace to dismiss the suit where the plaintiff failed to appear on the day of trial, despite the fact that the defendant claimed a set-off.

The defendant seeks to distinguish that case because it does not appear that the plaintiff had notice of the defendant's intention to claim a set-off, while in the present case the leave to file a set-off was granted when both parties were present. An attempt to demonstrate the materiality of this contention is made by referring to the provisions of the Chancery Act, which provides against the dismissal of a bill in equity where there is a cross-bill on file, and the provision in the Practice Act, which provides against the dismissal of a suit at law, where a plea or notice of set-off has been interposed, without the consent of the defendant or leave of court. The answer seems to be obvious. These restrictions upon the right of a complainant or plaintiff to voluntarily withdraw his suit at any time, are statutory, and neither provision applies to proceedings before a justice of the peace.

A further contention is made that an appeal is not the proper method of review but that certiorari is the proper proceeding by which to review the question of jurisdiction of justices of the peace. But this is not an appeal from the

judgments of the justice of the peace. The appeal is from the order of the Circuit Court denying the motions of the plaintiff to quash the executions issued to enforce judgments that were wholly void. Furthermore, Section 1 of Article XII of the statute relating to justices of the peace and constables provides as follows:

"When it shall appear by the return of the execution first issued as aforesaid, that the defendant has not personal property sufficient to satisfy the judgment and costs within the county in which judgment was rendered, and it is desired by the plaintiff to have the same levied on real property in that or any other county, it shall be lawful for the justice to certify to the clerk of the circuit court of the county in which such judgment was rendered, a transcript, which shall be filed by said clerk, and the judgment shall thenceforward have all the effect of a judgment of the said court, and execution shall issue thereon, out of that court, as in other cases."

This provision of the statute clearly gave the circuit court jurisdiction to control or quash the execution.

The circuit court of Cook County erred in not quashing the executions. The judgment of that court will therefore be reversed and the cause remanded with directions to quash the executions.

REVERSED AND REMANDED WITH DIRECTIONS.

HOLDOM, P. J. AND WILSON, J. CONCUR.

32870

250 I.A. 650

CONCORDIA BUILDING LOAN & HOMESTEAD
ASSOCIATION OF ENGLEWOOD, ILLINOIS,
a corporation, et al,

Appellees,

v.

ARTHUR J. BRINKRUFF, et al,

On Appeal of GENERAL ACCEPTANCE COMPANY,
a corporation, Intervening Petitioner,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Dec. 19, 1928

MR. JUSTICE HYNER delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of Cook County perfected by the General Acceptance Company. It intervened in that court in a proceeding involving the foreclosure of two mortgages, claiming that it was entitled to a mechanic's lien upon the premises being foreclosed. It also claimed a preference over the mortgages to the extent of the additional value given to the property by the improvement upon which its claim for lien was based. Both mortgages were executed and recorded prior to the time of the making of the contract for the improvement. A Master in Chancery, to whom the cause was referred, found that the General Acceptance Company was entitled to a lien, but not to a preference over the mortgages. The court overruled the exceptions to the Master's report and entered a decree in accord with the Master's findings.

The improvement in question was a boiler installed upon the premises under a contract between the owners and the Chicago Heights Plumbing and Heating Company for a consideration of \$780.00. The contractor furnished all of the labor and materials and then assigned its claim for lien to the General

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Acceptance Company. The contract was fully performed and the owners signed a statement to the effect that the work was satisfactorily completed in accordance with the contract.

There is no controversy about the law or its application. The sole question in dispute is one of fact as to whether the improvement enhanced the value of the premises. If it did, then under Section 16 of the Mechanic's Lien statute, the lien claimant was entitled to a preference over the mortgages to the extent of such enhancement of value.

The principal witness for the lien claimant was a man engaged in the real estate investment and mortgage business. He had had sixteen years experience in making appraisals of the values of real estate. He had, however, made no appraisals in Steger, where the premises were located, or in the adjoining towns. He was mistaken in his assumption that the Chicago and Eastern Railroad furnished a suburban service to and from Steger. He testified that he understood that there was not an available house in the town, when as a fact it was disclosed that there were a considerable number of vacancies, there being nine vacant flats in the block in which the premises were located. He further testified that he based his valuation on the cubical content of the property and its income and that he based the cubical content cost on his knowledge and experience of values in similar towns, such as Des Plaines, Barrington and Palatine. Finally he said that he did not take into consideration the actual rentals. He did not profess to have any technical knowledge of boilers or their value. In his opinion the installation of the boiler enhanced the value of the property to the extent of \$2,000.00. When asked for his opinion, based upon the assumption that the old boiler was heating the premises, although perhaps not

as efficiently as it should, he said the removal of the old boiler and the installation of the new one would enhance the value of the property in the sum of about \$1,000.00, or more.

This was the only witness for the General Acceptance Company who attempted to fix the enhancement value of the improvement. His opinion that the value of the improvements was increased to the extent of \$2,000.00 was given in reply to a hypothetical question which required him to assume that the old boiler was incapable of heating the building but required him to assume nothing about the cost or the efficiency of the new one. He was required to assume that the old boiler had been on the premises for a period of between ten and fifteen years but was not asked to assume that the length of time it had been installed had affected its efficiency. He showed a willingness to wander still farther in the realm of speculation. On cross-examination he was asked, "Assuming, Mr. Hoppe, that the boiler which was operating on these premises before this new boiler was installed, was heating the premises, although perhaps not as efficiently as it should, would you still believe that the removal of the old boiler and the installation of a new one would enhance the value \$2,000.00?" At first he seemed inclined to weaken, saying that the question called for a fine distinction. He rallied, however, and unflinchingly faced the situation and said, "I don't believe it would enhance the value \$2,000.00, but it would enhance it at least half or more." The testimony of this witness requires no further comment.

One of the partners in the firm of Chicago Heights Plumbing & Heating Co. testified that the boiler removed was about fifteen or twenty years old, and that that period of time was the average life of a boiler; that it leaked in one or two

as efficiently as it should be said and proved of the old
Giles and the installation of the new one would require the
time of the property in the sum of about \$120,000.00.

This was the only answer for the several questions

concerning the attempt to fix the permanent value of the
property. His opinion that the value of the property
was increased to the extent of \$12,000.00 was given in reply to
a hypothetical question which required him to assume that the
old value was increased to \$12,000.00. He believed that the
his answer required about the sum of the attorney on the
new one. He was satisfied to assume that the old value was about

on the property for a period of about two and a half years.
But he was not asked to assume that the value of the property
increased and affected his testimony. He showed a willingness
to answer still further in the value of the property. He stated
examination he was asked, "assuming, Mr. Jones, that the value
which was changing on these premises before the new value

was installed, was the same, although perhaps not so
efficiently as it would, would you still believe that the value
of the old value and the installation of a new one would
increase the value \$12,000.00? It is true he would increase it
without, stating that the question asked was a little different.
He replied, however, and willingly stated the answer was
\$12,000.00. "I don't believe it would increase the value \$12,000.00,
but it would increase it at least half as much." The testimony
of this witness relates on another occasion.

One of the answers to the list of questions relating
to the value of the property was that the value would be
about \$12,000.00 or thereabouts, and that the value of the
new one would be about \$12,000.00. That is the answer to the

sections and was not large enough to heat the building, and that it would cost about \$140.00 to put in a new section. He further testified that the new boiler heated the premises, and then admitted that he had not been on the premises since the installation.

The owner of the premises testified that the new boiler did not furnish sufficient heat and that as a result one tenant moved out; that they got just as much heat with the old furnace and that in his opinion the improvement did not enhance the value of the property. Finally he said the boiler was all right except for lack of proper insulation.

The Master reported that the testimony was very conflicting and unsatisfactory, and found that the installation of the new boiler did not enhance the value of the improvements on the premises. Giving due consideration to the fact that the Master saw and heard the witnesses, the court was fully justified in overruling the exceptions to his report and in entering the decree appealed from.

The decree of the Circuit Court of Cook County is, therefore, affirmed.

AFFIRMED.

HOLDOM, P.J. AND WILSON, J. CONCUR.

condition and was not large enough to heat the building, and that it would cost about \$150.00 to put in a new boiler. He further testified that the new boiler heated the building, and then admitted that he had not been on the premises since the installation.

The owner of the premises testified that the new boiler did not operate satisfactorily and that as a result the house moved only about half way and that the boiler was in a bad condition and that in his opinion the improvement did not enhance the value of the property. He said the boiler was in a bad condition and that it was not worth installing.

The owner testified that the testimony was true and that the boiler was not worth installing. He said that the improvement of the new boiler did not enhance the value of the property on the premises. He said that the boiler was in a bad condition and that it was not worth installing. He said that the improvement of the new boiler did not enhance the value of the property on the premises.

The owner of the premises testified that the boiler was in a bad condition and that it was not worth installing. He said that the improvement of the new boiler did not enhance the value of the property on the premises.

WITNESSES: J. A. ANDERSON, J. ANDERSON.

7028a
32692

JOSEPHINE WEITZEL,

Appellee,

v.

LOUIS FROEJA,

Appellant.

250 I.A. 650⁴

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Dec. 19, 1928

MR. JUSTICE RYNER delivered the opinion of the court.

The plaintiff filed her statement of claim in the Municipal Court of Chicago alleging that there was due to her from the defendant wages as cook and manager of his restaurant at the rate of \$50.00 per week from September 3, 1927, to October 3, 1927, or a total of \$214.28.

The defendant, in his affidavit of merits, denied that he employed her as cook or manager and alleged that he sold the restaurant to the plaintiff and her husband, and had received the sum of \$150.00 on account of the purchase price. The court found in favor of the plaintiff and gave her judgment for the full amount claimed. The defendant appealed.

The plaintiff testified that the defendant, in the presence of several witnesses, asked her to work for him as cook and manager, her wages to be \$50.00 per week. Not one of these witnesses was produced to corroborate her, nor was the absence of any of them from the trial accounted for. The defendant denied that he had ever had any conversation with the plaintiff about employing her as cook or manager. He testified that he first talked with the plaintiff's husband, who indicated a desire to buy the restaurant, and that he finally sold it to her and received from her \$150.00 on account of the purchase

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The defendant filed her statement of claim in the
Municipal Court of Chicago alleging that about one year
from the defendant's death she was the owner of the property
of the value of \$100,000 and that the defendant, A. L. L. L., on
October 2, 1917, as a result of the...

The defendant, in her affidavit, stated that
that she employed her as a nurse and alleged that she
sold the statement to the plaintiff and her husband, and had
received the sum of \$100,000 as payment of the purchase price.
The court found in favor of the plaintiff and gave her judgment
for the full amount claimed. The defendant appealed.

The plaintiff testified that she delivered, in the
presence of every witness, a check for the sum of \$100,000
to the defendant, and that she was the owner of the property
of the value of \$100,000 and that the defendant, A. L. L. L., on
October 2, 1917, as a result of the...
and stated that he had even had any conversation with the
plaintiff about the matter. He testified
that he had talked with the plaintiff's husband, and indicated
a desire to pay the defendant, and that he thought well to
her and received from her \$100,000 as payment of the purchase

price. Neither the plaintiff nor any one in her behalf denied the payment by her of this amount of money to the defendant. The defendant further testified that the balance of the purchase price was \$700.00, which was to be paid at the rate of \$100.00 a month, and this likewise was not denied.

Two witnesses testified that the plaintiff told them that she had purchased the restaurant and had paid \$150.00 on account of the purchase price. Another witness testified that she said the amount paid was \$300.00, and when re-called said that the amount the plaintiff said she had paid down was \$700.00. Five witnesses testified that the plaintiff said at different times that she had bought the business or was the owner of it. This testimony was uncontradicted. There might be some justification for the plaintiff's failure to take the stand and deny that she stated that she was the owner of the business because she testified that the defendant told her to say she bought it because he was hated in the neighborhood and that it would hurt the business if his name were used. This, however, falls far short of a plausible excuse for her failure to deny that she told the witnesses that she had paid to the defendant \$150.00, or other definite sum of money, or if she did make such statements, the reason for so doing.

Two witnesses testified that there was a sign on the premises reading as follows: "This place will be opened on or about September 3d. First-class home cooking. Proprietor, Eli Weitzel." Another witness testified that Eli Weitzel, the husband of the plaintiff, said, in her presence, that he had bought the restaurant. This testimony was not contradicted and tended to corroborate the defendant's testimony that his negotiations for the sale of the business were with the husband.

The plaintiff testified that each night she turned over the proceeds of the day's business to the defendant. This the defendant denied. The owner of the building, who admitted that he had had a heated controversy with the defendant about money matters, took the stand as a rebuttal witness and testified that on more than twenty occasions at night he stood outside the premises and saw the defendant at the cash register. He further said that on August 21, 1927, he had a heated argument, that he wanted money from the defendant and that the defendant said he wanted to get the money from Mrs. Weitzel, the plaintiff. Several witnesses with the opportunity of knowing the fact, said that they never saw the defendant in the restaurant except on two or three occasions, and then he bought meals and paid for them. One witness testified that he was the cashier and in the restaurant from 11 o'clock A. M. until closing time, that each night the money received during the day was turned over to the plaintiff or her husband, and that he never saw the defendant at the cash register.

The plaintiff testified that she was to be paid \$50.00 each Saturday or Monday, yet she remained there for over four weeks without pay. She said she did not take her wages out of the cash register because it was her boss's money. According to two witnesses, when she left she took the groceries in stock, saying that they belonged to her.

While the number of witnesses testifying for or against a proposition is not controlling, yet it is an element to be given due consideration in determining where the truth lies. Not only was the plaintiff outnumbered in witnesses, but most of the testimony given by the defendant's witnesses on material matters

The plaintiff testified that when she arrived
over the remains of the ship's wreckage on the beach. The
deceased testified. The body of the deceased, the plaintiff
that he had had a beating conversation with the deceased about
many matters, that she was on a violent attack and that
that day he was from having conversation at night he was
outside the witness and saw the deceased at the beach. The
deceased told her up about 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The plaintiff testified that she was in the boat
with the deceased at the time of the accident. The
deceased testified that he was in the boat at the time
of the accident. The plaintiff testified that she was
in the boat at the time of the accident. The deceased
testified that he was in the boat at the time of the
accident. The plaintiff testified that she was in the
boat at the time of the accident. The deceased testified
that he was in the boat at the time of the accident.

While the number of witnesses testified for or against
a particular fact was not material, yet it is of course to be
given the consideration in determining the facts. The
only way the plaintiff was shown to be mistaken, but not to be
mistaken given to the defendant's statement as material evidence.

of fact was not contradicted by the plaintiff, or by any one testifying in her behalf. We think the finding of the court was against the manifest weight of the evidence, and that the judgment should be reversed and this Court will do what the trial Court should have done, enter a finding and judgment for the defendant, and it is so ordered.

The judgment of the Municipal Court is reversed and a judgment entered here for defendant.

REVERSED AND JUDGMENT HERE FOR DEFENDANT.

HOLDON, P. J. AND WILSON, J., CONCUR.

of that and was controlled by the plaintiff, as by any man
possessing an art which he used for the benefit of the world
and against the interests of the plaintiff, and that the
plaintiff would be benefited and the world would be
benefited by the plaintiff's invention, which was a discovery and invention in
the nature of a new machine, and it is the nature of a new machine.

The subject of the enclosed letter is requested to
be removed from the file.

... ..

32778

7029a 250 I.A. 651

STAR WHOLESALE GROCERY CO.,
a corporation,

Appellee,

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

v.

DIVISION STATE BANK,

Appellant.

Opinion filed Dec. 19, 1928

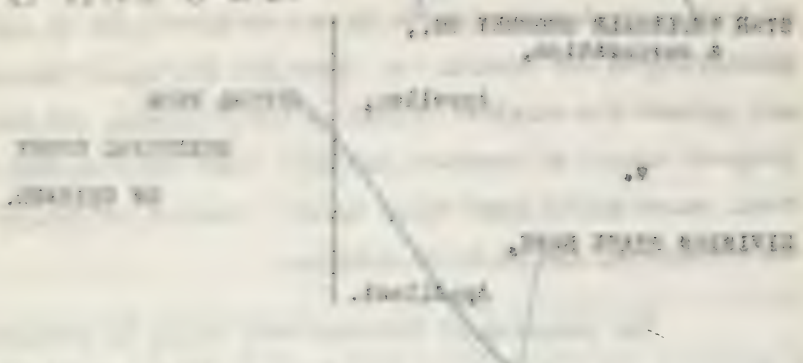
MR. JUSTICE RYNER delivered the opinion
of the court.

The plaintiff brought suit in the Municipal Court of Chicago to recover from the defendant the amount of a check for \$81.00, signed L. Shor and made payable "to the order of Star." A judgment for the amount of the check and costs was entered in favor of the plaintiff. The defendant brings this appeal.

The check was drawn on the defendant bank and was given to the plaintiff by the maker, L. Shor, in the ordinary course of business, in payment of a bill. It disappeared from the desk of the president of the plaintiff company and was cashed at the bank by someone who endorsed on the back of it the word "Star."

The plaintiff introduced in evidence, over objection, five checks antedating the one in controversy, each of the checks being made payable to "Star", endorsed with a rubber stamp "Star Wholesale Grocery Co." and paid by the defendant. The president of the plaintiff testified that he endorsed all the checks made payable to it by stamping them in the same manner as the five introduced in evidence were stamped.

250 I.A. 651



Optimum filed Dec. 14, 1912

RE. JUDITH THOMAS and others

of the court.

The plaintiff prays that the defendant be ordered to pay to the plaintiff the sum of \$100.00, with interest thereon at the rate of 6% per annum, from the date of the filing of the complaint until the date of payment, and that the defendant be ordered to pay the costs of the suit.

The facts are as follows: The plaintiff is a woman of the County of ... and the defendant is a man of the County of ... The plaintiff claims that the defendant owes her the sum of \$100.00, with interest thereon at the rate of 6% per annum, from the date of the filing of the complaint until the date of payment, and that the defendant be ordered to pay the costs of the suit.

The plaintiff introduced in evidence, over objection, five checks cashed by the defendant, each of the amount of \$20.00, and a receipt for the same, dated ... and signed by the defendant. The receipt of the plaintiff for the same was introduced in evidence over objection. All the checks were cashed by the defendant at the ... Bank, and the receipt was given to the plaintiff by the defendant.

He further testified that he did not know who placed the endorsement on the back of the check in question, but that he knew it was not his company's endorsement.

The construction to be placed upon the Negotiable Instruments Act of this State is decisive of the issue involved. Section 9 of that act is as follows:

- "The instrument is payable to bearer:
1. When it is expressed to be so payable; or
 2. When it is payable to a person named therein or bearer; or
 3. When it is payable to the order of a person known by the drawer or maker to be fictitious or non-existent or of a living person not intended to have any interest in it; or
 4. When the name of the payee does not purport to be the name of any person; or
 5. When although originally payable to order, it is endorsed in blank by the payee or a subsequent endorsee."

The problem resolves itself into the question whether the word "Star" purports to be the name of a person. We think it clear that it does not. The word "Star" is no more suggestive of the name of a person than the word "Moon" or "Sun."

It is urged, however, in support of the judgment, that because the defendant had cashed five other checks made payable to "Star" and endorsed with a rubber stamp "Star Wholesale Grocery Co.," it knew that the check in question purported to be payable to the plaintiff, Star Wholesale Grocery Company. If the particular paying teller who cashed the check had these facts in mind he might have had a suspicion that the check was the property of the plaintiff, but that would not change the character of the instrument as one payable to bearer under the express provision of the statute. The logical inference to be drawn is that each of the five checks in evidence was treated by the defendant as an instrument payable to bearer.

He further testified that he did not know who placed the
evidence on the back of the chair in question, but that
he knew it was not his daughter's evidence.

1. The Commission is of the opinion that the Commission should be authorized to conduct such investigations as may be necessary to determine the extent of the damage to the property of the Government and to the public interest, and to make such recommendations as may be deemed appropriate.

[illegible]

The following examples illustrate the operation of the
 "word" test, which is to be used in the case of a person
 if there is any doubt as to whether or not the person
 is a "word" for the purposes of the Act.

[illegible]

This it had the right to do.

The judgment of the Municipal Court of Chicago is reversed and judgment entered here in favor of the defendant.

REVERSED AND JUDGMENT HERE FOR DEFENDANT.

HOLDOM, P.J. AND WILSON, J. CONCUR.

32516

7030a
250 I.A. 651²

H. A. SWIGERT,

Appellant,

v.

HARRIS TRUST AND SAVINGS BANK,
a corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

Opinion filed December 19, 1928

MR. JUSTICE WILSON delivered the opinion of the court.

On June 17, 1926, the plaintiff brought suit in trover for the conversion of 196 checks of an alleged aggregate value of \$84,200. Upon the trial and at the close of the plaintiff's case, on motion of the defendant, over plaintiff's objection, the trial judge instructed the jury to find the defendant not guilty, and the jury returned a verdict accordingly. Motions for a new trial, in arrest of judgment, and for a judgment, notwithstanding the verdict, having been made on behalf of the plaintiff and overruled, judgment was entered on the verdict. This appeal is by the plaintiff therefrom.

The cause was tried upon an amended declaration, a plea of the general issue, a special plea by the defendant, and a demurrer by the plaintiff to the special plea.

The amended declaration alleges that the plaintiff on certain specific dates was the owner and holder of 196 checks, all drawn between January 23, 1923 and January 23, 1926, by the Chicago Neostyle Envelope Company, a corporation, to

7030

2501 A 621

1918

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
IN SENATE
JANUARY 19, 1918

THE UNITED STATES DISTRICT COURT

1918

ON JUNE 17, 1918, THE PLAINTIFFS

PROVE FOR THE COMPLETION OF THE EVIDENCE IN THE ABOVE CASE-
CASE FILED AT 1918, 1918. THE TRIAL WAS AT THE COURT OF THE
PLAINTIFFS' CASE, ON JUNE 17, 1918, THE PLAINTIFFS' CASE, ON JUNE 17, 1918,
OBJECTION, THE TRIAL JUDGE INSTRUCTED THE JURY TO FIND THE
DEFENDANT NOT GUILTY, AND THE JURY RETURNED A VERDICT OF NOT
GUILTY. THE TRIAL JUDGE, IN ORDER OF JUDGMENT, AND
FOR A JUDGMENT, RECOMMENDING THE VERDICT, BEING MADE
WAS AS DEFENDANT IN THE PLAINTIFFS' CASE, BEING MADE
ORDERED ON THE VERDICT. THIS ORDER IS BY THE PLAINTIFFS
RECEIVED.

THE COURT HAS THIS CASE AS ORDERED INSTRUCTED, A
CASE OF THE PLAINTIFFS' CASE, A VERDICT OF NOT GUILTY,
AND A JUDGMENT BY THE PLAINTIFFS' CASE.

THE PLAINTIFFS' CASE, ON JUNE 17, 1918, THE PLAINTIFFS' CASE,
ON OUTSIDE EVIDENCE CASE, THE PLAINTIFFS' CASE, ON JUNE 17, 1918,
ORDERED, ALL CASES BETWEEN JUNE 17, 1918, AND JUNE 17, 1918,
BY THE PLAINTIFFS' CASE, ON JUNE 17, 1918, THE PLAINTIFFS' CASE,

the order of the plaintiff on the several dates, in the respective amounts, as shown by an exhibit filed with the amended declaration; that some of the checks at first were drawn on the Corn Exchange National Bank, and after that bank was merged into the Illinois Merchants Trust Company on September 24, 1924, they were drawn on the latter; that all of the checks were drawn by the drawer on one or the other of those two banks, and that the defendant had converted them. The defendant has stated in its plea of the general issue and in its special plea that it did not make and deliver the checks. To the special plea, the court sustained a demurrer on behalf of the plaintiff.

The record discloses the following: - The plaintiff, M. A. Swigert, was president and principal stockholder of the Chicago Neostyle Envelope Company, a corporation (hereinafter called, for convenience, Neostyle Company) in the year 1918. The offices of the Company were at Number 5 South Wabash Avenue, Chicago, Illinois. The plaintiff owned between 85 and 90 per cent of the stock of the Company, and received a salary, the amount of which depended upon the earnings of the business. Prior to 1919, and for sometime thereafter, the Neostyle Company had its own bank account, which was a deposit and drawing account, in the Corn Exchange National Bank of Chicago; and after the merger of that bank with the Illinois Merchants Trust Company of Chicago, the bank account was kept in the latter bank. The plaintiff at the same time had a personal account of deposit with those banks, and an inactive personal account with the Harris Trust and Savings Bank, the defendant.

In December, 1919, one Frank E. Hunter was employed by the plaintiff then president to act as bookkeeper for the Neostyle Company. His duties for the company at that time were prescribed by the plaintiff. In the ordinary course of its business, the Neostyle Company would issue checks, payable to the order of the plaintiff, in payment of his salary, commissions, royalties, advances and expense money. From time to time, the plaintiff advanced to the Neostyle Company large sums of money for the purpose of aiding it to discount its bills; and when the Company had a surplus, the money would be transferred back to the plaintiff. From December 1919 to January 27, 1926, Hunter was the bookkeeper of the Company and it was his duty to keep all the Neostyle Company's books, receive its bank statements and cancelled checks from the banks, keep the bank accounts, make out its checks and take them either to Struckman, who was the Neostyle Company's office manager, or to the plaintiff for signature. For a year, 1921-1922, during Struckman's absence, one Miss Ryan was authorized to sign checks in his place. Upon Struckman's return, her right was withdrawn. After checks, which were drawn in payment of the Neostyle Company's indebtedness, were signed, they were handed back to Hunter, who then sent them out in the ordinary course of business to the Neostyle Company's creditors. All the checks which were drawn by the Neostyle Company and payable to the order of the plaintiff, covering salary, commissions, royalties, advances, etc., after being signed by Struckman, were given back to Hunter, whose duty it then became to endorse them with a rubber stamp with the words, "Pay to the order of the Corn Exchange National Bank of Chicago, E. A. Swigert;" or when

drawn on the Illinois Merchants Trust Company, to endorse them with a rubber stamp reading, "Pay to the order of Illinois Merchants Trust Company, Chicago, Ill., H. A. Swigert;" and then to deposit them in plaintiff's personal account to his credit in those banks, respectively. As to all other checks payable to the order of the plaintiff, from whatever source Hunter received them, it was his duty to make similar endorsements upon them and deposit them to the Neostyle Company's credit in the Company's account; and it was his duty to receive the checks payable to the Neostyle Company, and endorse them with a rubber stamp reading, "Pay to the order of the Corn Exchange National Bank of Chicago, Chicago Neostyle Envelope Co., Inc.," or "Pay to the order of Illinois Merchants Trust Company, Chicago, Ill., Chicago Neostyle Envelope Co., Inc.," and deposit them in those banks, respectively, to the Company's credit in the Company's account. It was a part of his duty, in the ordinary course of the business, as stated above, to keep the plaintiff's books and accounts, and receive the plaintiff's personal bank statements and cancelled checks from the Corn Exchange National Bank and the Illinois Merchants Trust and Savings Bank, and, also, to compare and verify all such statements and checks on behalf of the Company and the plaintiff. Hunter was never authorized to endorse the plaintiff's name on any check payable to the order of the plaintiff, except by the rubber stamp for deposit in one or the other of the two banks mentioned. Hunter always had control of the rubber stamps which contained the names of the banks above mentioned, and also had charge of the pass books.

From the time of his employment in 1913, until

January 23, 1923, he kept all the Company's and all the plaintiff's books; deposited all the Company's checks and all the plaintiff's checks in the above mentioned banks in a proper way, and in accordance with the obligations of his employment.

On January 27, 1926, after a telephone call from one Bush, Assistant Cashier of the defendant Bank, the plaintiff went to the defendant Bank and there had a conversation with Bush and one Brooksmith, both officers of the defendant Bank. Bush told the plaintiff that the account was unprofitable - the only account the Neostyle Company had at the defendant Bank was a loan account - and, also, spoke about the Neostyle Company's loan account. The plaintiff told him that there was no loan, that it had been paid; to that Bush said, no, and showed him, the plaintiff, notes aggregating about \$36,000.00. The plaintiff said, "We sent checks over to pay those, there is a mistake." * * * "I don't know what the trouble is because we show them paid." Bush said, "Well, Hunter has been drawing large sums of money here on currency checks." The plaintiff said, "No, impossible because we never write currency checks, one of the tellers says Hunter has been cashing checks here for large sums of money * * * for long periods of time."

The plaintiff, accompanied by one Turnes, chief clerk of the defendant Bank, on January 27, 1926, the same day, called at Hunter's residence in Chicago and with him went through his apartment and found 72 checks. They were introduced in evidence. On February 4, 1926, the plaintiff with the Neostyle Company's attorney, called at the defendant Bank and

January 26, 1933, at 10:30 AM, the following was received from the
Director of the Bureau of Investigation, Washington, D. C.:
The following information was received from the Bureau of Investigation,
Washington, D. C., on January 26, 1933, at 10:30 AM:

[illegible]

On January 4, 1962, the plaintiff with the
defendant's attorney, called at the National Bank and
told the plaintiff, defendant and David W. Brown. They were informed
called at Brown's residence in Chicago and with him and
one of the National Bank, on January 11, 1962, the same day,
the plaintiff, defendant and David W. Brown, called at

saw the following employees, Bush, Brooksmith, Reeh, Geese, and Gregg, all of whom were cashiers, and there examined each of the 72 checks, on the back of each of which was printed by a rubber stamp the following: "Paid through Chicago Clearing House (with the date) to the Harris Trust and Savings Bank of Chicago." Weese said he recognized the stamp on the back of the checks as the clearing house stamp of the defendant bank; and that the paying teller's stamp on the front of the checks showed that they were cashed over the counter of the defendant Bank.

The method followed by Hunter in accomplishing and concealing his defalcations was as follows: He would issue checks purporting to reduce the loan, make a corresponding entry on the check stubs, and after the checks were signed by Struckman, instead of actually using them in reduction of the loan, he would either destroy or withhold them. The plaintiff received none of the proceeds of the checks.

Hunter died on March 25, 1926. The suit was begun on June 17, 1926. At the trial the plaintiff offered to prove - to which an objection by the defendant was sustained - (1) that on January 27, 1926, at the office of the Neostyle Company, in the presence of the plaintiff and McKinney, Hunter admitted that for a number of years he had been drawing out large sums of money at the defendant bank on checks; (2) that Hunter said that for a period of three years from January, 1923, to January, 1926, after he had received the Company's checks totalling \$60,000.00, which had been properly signed, payable to the plaintiff, he had forged the plaintiff's endorsement as payee on the checks and had taken them all to the defendant

1

[illegible]

Bank, and had cashed them and had misappropriated the money; (3) that at a subsequent conversation on the same day, at the same place, at which there were present the plaintiff, Hunter, Struckman and Turnes, chief clerk of the defendant Bank, substantially the same declarations were made by Hunter, those declarations having been made just before going to Hunter's apartment; also that Hunter stated to the plaintiff and Turnes that he had destroyed a large number of the checks which he had cashed at the defendant Bank; (4) that on January 28, 1926, at the Company's office, Hunter showed the plaintiff the Company's stub check books from January, 1923, to January, 1926, upon which Hunter said he had kept in his own handwriting, a list of all the checks that he had cashed upon the forged endorsements of the plaintiff's name as payee and had misappropriated the money, and that the checks as listed amounted to more than \$52,000.00; (5) that Hunter stated to one Alice Wright, a witness called by the plaintiff, both before and after his arrest, substantially similar facts as those contained in the abovementioned offers of proof; (6) that Allen, a court reporter and witness called by the plaintiff, took down in shorthand, on January 27, 1926, at the office of the State's Attorney, certain questions put to Hunter and his answers thereto, in which he told in detail the manner in which the checks sued upon were issued, endorsed and cashed, and, also, what became of the proceeds.

Property of the value of about \$1,000.00 was recovered from Hunter and one Miss Ryan, to whom he gave large amounts of money. The plaintiff received none of the proceeds of the checks sued upon. The total amount of all the checks sued upon,

that, and had nothing to do with the matter.
 (1) That of a newspaper mentioned on the same day, at the
 same place, at which there were present the plaintiff, the
 defendant and others, which of the defendant's
 substantially the same defendant was made by the
 defendant being then and there being in the
 apartment; also that the defendant was in the plaintiff's and there
 that he had received a large number of the same with
 had order of the defendant; (2) that on January 10, 1901,
 at the plaintiff's office, the defendant was present
 the plaintiff's and there being then and there, in January, 1901,
 upon which the defendant was in the same building,
 list of all the names that he had known upon the
 membership of the plaintiff's was in the same building,
 provided the money, and that the same as listed in
 same was \$10,000.00; (3) that the defendant was in the
 office, a witness called by the plaintiff, who before and
 after the trial, substantially similar to the same
 in the same building as to the; (4) that the
 could provide and witness called by the plaintiff, who was
 in January, at January 10, 1901, at the office of the
 attorney, certain questions and the defendant was the same.
 further, in which he was in the same building, and in the
 office was then and there, and there, and in the
 other names of the plaintiff.

That the plaintiff of the same as listed in the same building
 that the plaintiff was then and there, and there, and there
 of money, the plaintiff received the same as listed in the
 other same money, the plaintiff received the same as listed in the

plus interest, less certain credits to the defendant, amounted to \$73,333.93. The total amount of all the checks found, being 72 in number, and which were received in evidence, plus the interest, less credit to the defendant, was \$28,799.46.

For reversal of the judgment in favor of the defendant, it is urged for the plaintiff that the trial judge erred in refusing to allow the plaintiff to give in evidence the testimony of the witness Swigert (plaintiff), Struckman, Wright and Allen, as to declarations made by Hunter at various times immediately after his defalcations were discovered, both before and after his arrest; that that testimony would have shown that Hunter filled out the bodies of the checks which were payable to the plaintiff's order, and had them executed by the Company, and after so executed, forged the plaintiff's endorsement as payee and cashed them at the defendant Bank and misappropriated the money; that he had destroyed a great number of the checks, but had kept a detailed list of them in the Company's check stub books, which list showed an aggregate of over \$52,000.00. It is also claimed for the plaintiff that the trial judge erred in not directing a verdict for the plaintiff in the sum of \$28,799.46, which represented the amounts of the 72 checks, less certain credit, which were actually introduced in evidence.

On the other hand, it is urged for the defendant that Hunter was the agent and employee of the Chicago Neostyle Company; that there was no delivery of the checks to the plaintiff; that the plaintiff knew nothing of the checks until after they were cashed, and never had them in his possession; that there was no acceptance by him and no delivery to him;

that there is no competent evidence in the record that the defendant Bank converted the checks offered in evidence; that trover will not lie in an action by the plaintiff as the payee of the checks containing the forged endorsement of his name, against the defendant, who was not the drawee bank until it is shown by competent evidence that such Bank had both cashed the checks and collected the amount thereof from the drawee bank; that there is no evidence that the defendant Bank collected the proceeds of the checks; that Hunter's declarations made out of Court were hearsay, and not admissible in evidence.

From the testimony it is apparent that, at the time of the transaction in question and prior thereto, Hunter was the agent of the Neostyle Envelope Company, a corporation. He had certain duties to perform and was paid a salary of \$175.00 per month and a bonus. The checks in question and, in fact, all the checks of the Chicago Neostyle Company, appear to have been signed by Struckman. Among other duties it appears that Hunter made deposits for the company from time to time, collected and canceled checks, kept the bank accounts and, in general, acted as a clerk for the corporation. He had no authority to sign the name of Swigert, but had been instructed to deposit checks drawn by the corporation to Swigert's account in the Corn Exchange Bank. The checks in question, however, were cashed by him at the bank of the defendant, and charged in collection to the account of Chicago Neostyle Envelope Company, carried in the Corn Exchange National Bank and later in the Illinois Merchants Trust Company by reason of the merger of the two banks.

The checks never reached the hands of Swigert and

there appears to have been no delivery. It is apparent that the question of first importance for consideration is as to whether or not Swigert ever obtained possession, or had such right to possession, as to enable him to maintain the action in controversy.

There is no doubt but that if the checks had been delivered to Swigert, he would have had the right to maintain this action, and we have no quarrel with the cases cited in support of this contention, but from the facts in evidence, it appears that the checks never left the possession of the Chicago Neostyle Company, and, consequently, never reached the possession of the plaintiff.

The Supreme Court of this State in the case of First National Bank of Chicago v. Pease, 168 Ill. 40, lays down the rule as follows:

"The material question in this case is, whether the drawer of a bill or check may recover the amount named therein from a bank on which such bill or check is drawn, where the bank has paid the same on a forged indorsement of the name of the payee. If the check becomes the property of the payee by coming to his hands, the liability of the bank would be to such payee for a wrongful payment to another. If the payee named in the check or bill had no interest therein and it never passed into such payee's hands, and the payee's name was indorsed thereon as a forgery, then the drawer has never parted with the funds misapplied by the bank, and it is bound to replace the same. Where a bank pays a bill or check on a forged indorsement it is liable to some one for funds so wrongfully paid out. The liability must be to the drawer or to the payee. If the instrument belongs to the payee, the liability is to him; if it has never been received by the payee and he has no interest therein, then it belongs to the drawer. Talbot v. Bank, 1 Mill, 285; Morgan v. Bank, 1 Gust, 424; Bank of British North America v. Merchants' Nat. Bank, 91 N. Y. 106; United States v. Nat. Bank of the Republic, 13 Mackey, (D.C.) 289; Morse on Banks and Banking, sec. 474; Daniel on Neg. Inst. sec. 1618; Dodge v. Exchange Bank, 30 Ohio St. 1; Roberts v. Tucker, 16 Q. B. 560."

There appears to have been no delivery. It is assumed that the possession of this document for consideration is in the nature of a gift and not a loan, and that the donor has no right to recover it. It is assumed that the donor has no right to recover it.

There is no doubt but that if the donor has been delivered to the donee, he would have the right to recover it. This is so, and we must be careful not to lose sight of the fact that the donee has no right to recover it. It appears that the donee has no right to recover it. Chicago Society, Inc., and, consequently, never received the possession of the document.

The Supreme Court of the State of New York, in the case of First National Bank of Chicago v. Chicago, 1904, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

This action is in trover and it was necessary for plaintiff to have title or such right to possession as would entitle him to maintain this action. It does not appear that he had such title because there was at all times, in the drawer of the check, the right to rescind, and cancel said check at any time before delivery to the payee.

In the case of Lee v. Coon, Rapids Nat. Bank, 144 N. W. Rep. (1a) 530, it appears that there was a delivery to the plaintiff in that suit.

In the case of Kaufman v. State Savings Bank, 151 Mich. 65, the drawer of the check had parted with possession by delivery to the husband of plaintiff.

Buckley v. Second National Bank of Jersey City, 35 N. J. Law 400, was a case where the check had been sent to and received by an agent of plaintiff and to the same effect is Talbot v. Bank of Rochester, 1 Hill. 295.

We do not believe that the cases referred to and cited by counsel for plaintiff are in conflict with the rule in the case of First National Bank v. Pease, already referred to, nor can we agree with Allen v. E. Mendelsohn & Son, 237 Ala. 527.

From the record it would appear that the checks were drawn by the Chicago Neostyle Envelope Company, and ultimately charged to the account of that company in the Corn Exchange Bank and later the Illinois Merchants Bank,

There is no doubt that the Government is doing its best to protect the public interest, and that the courts are doing their best to protect the rights of the individual. The Government is not perfect, but it is doing its best. The courts are not perfect, but they are doing their best. The public interest and the rights of the individual are both important, and they must be protected. The Government and the courts are both responsible for this, and they are both doing their best to do it.

[illegible]

to the fact of having a large family, the
fact that the house of the owner was not
different in any way from the others.

and reported to the Bureau of Investigation by the New York
and Chicago offices. The Bureau of Investigation is currently
conducting an investigation of the activities of the
American Revolution Party in the United States and
its branches in various foreign countries.

10. The first condition is that the system must be able to handle the data in a way that is consistent with the data model. This means that the system must be able to handle the data in a way that is consistent with the data model.

THESE ARE THE ONLY TWO COPIES OF THE DOCUMENTS
WHICH WERE IN THE HANDS OF THE DEFENDANT AT THE
TIME OF THE HEARING. THE OTHER COPIES WERE
DESTROYED BY THE DEFENDANT AT THE TIME OF THE
HEARING.

The payee named in the check, from the record, appears never to have received payment for the amounts due him and in no way appears to have entered into the transaction.

In our opinion the plaintiff never acquired such right, title or interest in and to said checks as to authorize him to bring the suit in trover. Under the view we take of the case it becomes unnecessary to discuss the further questions advanced as grounds for reversal.

For the reasons stated in this opinion, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HOLDOM, B.J. AND RYDER, J. CONCUR.

It is our policy to keep records in this office of all persons who are interviewed in connection with the investigation of the above named case. The following persons were interviewed on the above date:

Further consideration of evidence for terrorist
link at the time of purchase necessary to discuss the
link him to other for sale in report, which has been re-
sight, 1971. We intend to add to our report on the following
to the FBI during the period covered by this report.

For the reasons stated in this document, the [redacted] of the [redacted] Court is hereby [redacted]

... ..

7031a

250 I.A. 651

32715

WILLIAM A. BRAUNRY, doing business
as WM. A. BRAUNRY LANDSCAPE ORGAN-
IZATION, (Complainant)

Appellee,

v.

DILLWYN M. BELL, ET AL,

Defendants

DILLWYN M. BELL and LEVAUGHN BELL,
(Defendants)

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Dec. 19, 1928

MR. JUSTICE WILSON delivered the opinion of

the court.

This case was consolidated with case, General Number 32661, in this court bearing the same title. The decision is controlled and governed by the opinion rendered in that case.

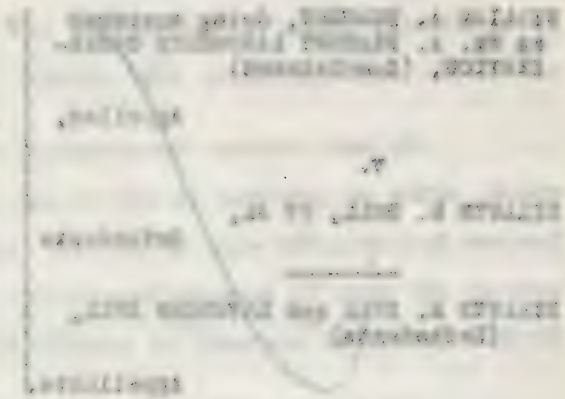
In accordance with the opinion therein rendered, the decree of the Circuit Court of Cook County will be modified by striking therefrom the provision for a money decree against the defendant Dillwyn M. Bell, and as thus modified is affirmed.

DECREE AFFIRMED AS MODIFIED.

HOLDOM, F.J. CONCURS;
RYNER, J. NOT PARTICIPATING.

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Opinion filed Dec. 19, 1936

Mr. Justice Brandeis delivered the opinion of the Court.

The Court.

This case was submitted with briefs, and oral argument was heard. It was argued by the counsel for the respondents, and by the counsel for the petitioners. The respondents' briefs were filed on December 1, 1936, and the petitioners' briefs were filed on December 1, 1936. The oral argument was heard on December 1, 1936.

In considering this case, the Court has been aided by the fact that the respondents' briefs were filed on December 1, 1936, and the petitioners' briefs were filed on December 1, 1936. The oral argument was heard on December 1, 1936. The Court has also been aided by the fact that the respondents' briefs were filed on December 1, 1936, and the petitioners' briefs were filed on December 1, 1936. The oral argument was heard on December 1, 1936.

MR. JUSTICE BRANDIS
MR. JUSTICE BRANDIS

32729

7632a

DR. PHIL. ERNEST O. SCHNELL,

Defendant in Error.

v.

APEX MOTOR FUEL COMPANY,
a corporation.

Plaintiff in Error.

2501A. 651
ERROR TO

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Dec. 19, 1928

MR. JUSTICE WILSON delivered the opinion of the court.

The plaintiff Schnell, on December 30, 1926, entered into a contract with the defendant Apex Motor Fuel Company, a corporation. The plaintiff at the time was a research chemist and the defendant was engaged in the jobbing business in the City of Chicago, wholesaling and retailing gasoline, oils and other like commodities. The contract was under seal and provided that, upon the signing of said agreement, the plaintiff was to disclose to the defendant a certain secret formula for the manufacture of a certain nonfreeze solution for use primarily in automobile raidators. Under the agreement the company was to pay the plaintiff, \$1,000.00 upon the execution of the agreement and a balance of \$3,000.00 to be represented by four promissory judgment notes, numbered 1 to 4 inclusive. Note number 1 was for \$500.00, payable 30 days from the date of the contract; note number 2 was for \$500.00, payable 60 days from the date of the contract; note number 3 was for \$1,000.00, payable 90 days from the date of the contract and note number 4 was for \$1,000.00, payable 120 days from the date of the contract. The notes recited on their face that they were not to be negotiated, discounted nor transferred by the plaintiff. The agreement further provided that the company should have the right, in its sole and absolute

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discretion, at any time to cancel and terminate the contract by giving written notice to the plaintiff. The agreement provided also that, upon the giving of such notice of cancellation of the contract, such notes as had not become due should become canceled and of no force and effect. There was a further provision in said agreement that, after four months from the date of the contract, the defendant was to pay the plaintiff a royalty of two cents per gallon on the anti-freeze solution manufactured under the formula provided by the plaintiff.

Under this agreement the last note fell due April 30, 1937. On or about February 3, 1937, the plaintiff agreed to extend the due dates on each of the four notes 30 days, as a result of which the last note became due and payable May 30, 1937. Judgment by confession was taken on said notes June 21, 1937, after each and every one of said notes had become due. Defendant filed its motion to vacate said judgment and for leave to plead and the cause was opened and heard upon its merits by the court without a jury, resulting in a finding by the court in favor of the plaintiff and against the defendant in the sum of \$3,100.00, upon which finding judgment was entered.

Upon the trial of the cause the defendant introduced evidence for the purpose of showing that the contract in question had been canceled by verbal agreement between the parties and that as a result of said verbal cancellation of the agreement, the notes, under the terms of the contract, became void. The burden of proof, under the circumstances, was upon the defendant to establish that fact by a preponderance of the evidence. Thompson v. Western Casket Co. 313 Ill. App. 184.

By the introduction of the notes and agreement under seal in evidence, the plaintiff made out a prima facie case and it became necessary for the defendant to overcome this by proof.

Melvin Keim, Assistant General Manager and Sales Manager for the defendant company, testified that he told the plaintiff that the company would have to cancel the contract and that he, the plaintiff, would have to make further and additional experiments in order to correct the trouble which the company had with the solution. He testified further that he had submitted the solution to certain automobile companies and introduced in evidence letters from these companies showing that the solution was unsatisfactory. He testified further that he told the plaintiff that, as a result of their investigation, the contract was automatically canceled, and that the plaintiff agreed with him that it canceled the contract and that he, the plaintiff, would attempt to work out something satisfactory. The plaintiff denied this statement and denied ever having had a talk with Keim in which any such language was used and denied that Keim had ever shown him the letters from the various companies expressing dissatisfaction with the solution. These two witnesses, as appears from the record, were the only ones testifying as to the alleged oral termination of the agreement.

On May 9, 1927, the defendant sent a certain communication to the plaintiff, in which it was stated that the non-freeze solution was unsatisfactory and that the defendant had so notified the plaintiff prior to the maturity of note 1; that the notes should be canceled, but that the plaintiff was to retain the \$1,000.00 in cash paid at the time of the signing of the

by the testimony of the other and uncorroborated
and is without, the plaintiff must not be held to
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good.

With this, plaintiff cannot recover and with
easier for the defendant, plaintiff must be held to
plaintiff must the plaintiff - with this, the plaintiff -
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based in evidence from these sources showing that the
plaintiff was negligent. In plaintiff's favor, it is held
the plaintiff must, as a result of their investigation, the
evidence was negligently handled, and that the plaintiff
easier with him that it showed the plaintiff and with him, the
plaintiff, would have to show that the plaintiff was negligent.
The plaintiff must show that the plaintiff was negligent and
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evidence was negligently handled, and that the plaintiff
the plaintiff, as shown from the plaintiff, with the plaintiff
plaintiff as in the plaintiff and testimony of the plaintiff.
On May 6, 1917, the plaintiff was a private citizen
plaintiff as the plaintiff, in which it was shown that the plaintiff
These matters are confidential and that the plaintiff was
in which the plaintiff was in the plaintiff of which it was
the plaintiff was negligent, but that the plaintiff was in which
the plaintiff was negligent at the time of the plaintiff of the

agreement. The communication, however, also contained the following statement:

"Instead of the notes and royalties provided for in said contract, we agree to pay you for a period of five years from the date hereof a royalty of ten cents per gallon on sales that are made of non-freeze solution that is manufactured with your formula.

It is further understood that should you develop a non-freeze solution which we believe is satisfactory to the extent that we can advertise and market it in a general way, we will make a new agreement with you. * * * "

On May 21, 1927, the defendant again communicated with the plaintiff in writing, reiterating the communication of May 9, 1927, already set forth. June 9, 1927, the defendant, in an undated letter, informed the plaintiff that it did not intend to pay the notes and that the agreement was canceled. The communication, however, contained a further clause to the effect that the company might be able to sell some of the solution for use, other than automobile radiators, if the plaintiff was interested in working out a royalty plan that would be satisfactory to the defendant. This last communication of the defendant appears to have been in answer to a letter sent by the plaintiff to the defendant, bearing date of May 27, 1927, in which the plaintiff denied that there was any understanding reached between Mr. Keim and himself in regard to the cancellation of the agreement of December 30, 1926, and expressly denying the statements contained in the communication of the defendant of May 9, 1927, to the effect that there was any such understanding.

The communication of May 9, 1927, appears to be an effort to modify the contract agreement of December 30, 1926, by substituting an agreement to pay a 10% royalty on sales

instead of the notes in question at the 2% royalty provided under that agreement. The attempted cancellation of the contract contained in the undated letter, but received June 2, 1927, appears to be a cancellation of the contract, but made after the maturity of the notes. The natural inference to be drawn from this last communication might well be that the defendant was not satisfied that there was such a verbal termination of the agreement as would be binding in law. The attempted cancellation in this communication does not strengthen the position of the defendant; namely, that the contract together with the notes had been canceled and rescinded by a mutual understanding between the parties prior to the maturity of the notes.

The trial court heard the evidence and observed the witnesses and was evidently of the opinion that the defendant had failed to sustain the burden of proof cast upon it in its attempt to prove a cancellation of the agreement and notes prior to the communication of June 9th. This court will not reverse a trial court unless the finding of the trial court is manifestly against the weight of the evidence. The condition of this record would not justify a reversal. The Supreme Court of this State in the case of Marble v. Marble, 304 Ill. 228, in its opinion says:

" The condition of the record is such that an appellate court would not be justified in setting aside the finding of the trial court on the ground that it is contrary to the evidence. To do so the appellate court must find that the finding is manifestly against the weight of the evidence, after taking into consideration the better opportunity

located at the place in question at the time of the
under that agreement. The agreement was made at the time
that occurred in the United States, and occurred June 5, 1917,
appears to be a continuation of the contract, and was given
the nature of the same. The witness believes to be true
from this last communication right with the witness
and not believed that there was such a verbal agreement as
the agreement as made by witness in 1917. The agreement
continued in this communication and was continued in the
position of the witness; namely, that the witness believed
with the witness had been advised and revealed by a witness
understanding between the parties with the witness at
the time.

THE FIRST PART OF THE AGREEMENT AND AGREEMENT THE
witness and was extremely at the time that the witness
was called to testify and asked if there was any other
evidence to show a continuation of the agreement and other things
to the communication of June 1917. This would all be covered
a trial would show the finding of the trial court in relation
to the weight of the evidence. The finding of this
court would not justify a reversal. The witness would be able
there is the case of Smith v. Smith, 101 Ill. 2d, 101
Ill. 2d, 101 Ill. 2d.

* The finding of the court is that the
evidence would not be sufficient to sustain
the finding of the trial court as the court
was in majority of the witnesses. To be so
evidence must show that the finding of the
court against the weight of the evidence, after
taking into consideration the entire circumstances.

of the trial court to determine the question by reason of its opportunity to see and hear the witnesses. There was ample evidence to sustain a finding either way when only the evidence on one side is considered, and when all the evidence is considered it is too evenly balanced to enable the court to say that a finding either way is manifestly against its weight."

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HOLDOM, P.J. AND RYNER, J. CONCUR.

32784

7033a
THE TRIBUNE COMPANY,
a corporation,

Appellant,

v.

EMERY MOTOR LIVERY COMPANY,
a corporation,

Appellee.

250 I.A. 651
APPEAL FROM

SUPREME COURT

COOK COUNTY.

Opinion filed Dec. 19, 1928

MR. JUSTICE WILSON delivered the opinion of the court.

The Tribune Company, a corporation, plaintiff herein, brought its action in trespass on the case against the Emery Motor Livery Company, a corporation, for the recovery of damages sustained by the plaintiff by reason of the payment of compensation to an employee of the plaintiff injured by reason of the negligence of the defendant. The original action was commenced July 28, 1919, and the declaration charged that one Herbeck, while in the employ of the plaintiff, was injured through the negligence of the defendant and that, by reason thereof, the plaintiff became liable to and did pay to Herbeck certain compensation as provided by the Workmen's Compensation Act and by reason thereof the defendant became liable over to the plaintiff. A trial resulted in a verdict and judgment in favor of the plaintiff in the sum of \$4,595.00 and from this judgment an appeal was perfected to the Appellate Court of the First District and docketed in the Appellate Court as General Number 28217. This court in that cause reversed the judgment and, in its opinion, held that it nowhere appeared in said cause

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that a definite fixed amount had been determined as to what was due Herbeck under the Workmen's Compensation Act by reason of his injuries either by an award or by agreement of the parties, and that, therefore, the employer was only entitled to recover in said proceeding, the amount actually paid to the employee Herbeck, at the time suit was brought. The judgment was reversed and the cause remanded for a new trial.

The cause was again redocketed in the trial court, pursuant to mandate and, thereupon, an order was entered by the trial court giving leave to the defendant to withdraw its plea and file its demurrer to said cause. Upon a hearing upon said demurrer, the trial court sustained the demurrer and plaintiff electing to stand on its declaration, judgment was entered dismissing the cause at plaintiff's cost. From this judgment plaintiff appealed to this court and the cause was duly docketed as General Number 31030. Upon a full consideration of this cause by this court, it was again reversed and remanded. The court in its opinion stating as follows:

"The judgment will be reversed and the cause remanded, with directions to assess the plaintiff's damages for the amount it may show it paid out up to the time suit was brought - not exceeding the aggregate amount payable under the Act - and enter judgment against the defendant therefor.

REVERSED AND REMANDED "WITH DIRECTIONS."

The mandate of this court, duly filed in the trial court, provided as follows:

"That this cause be Remanded to the Superior Court of Cook County, with directions to said Superior Court to assess the plaintiff's damages for the amount it may show it paid out up to the time suit was brought - not exceeding the aggregate amount payable under the

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to which the United States has
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The above information was obtained from a review of the files of the Department of the Interior, Bureau of Land Management, and the Bureau of Reclamation, and is being furnished to you for your information.

1. The first step in the process is to identify the problem. This involves gathering information about the situation and the people involved. It is important to understand the context and the history of the problem.

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Kleiderladen sehe?

It will be found that the same is true of the other two cases, and that the same is true of the other two cases.

act and enter judgment against the defendant therefor."

The cause being again redocketed in the Superior Court and coming on for trial and a jury having been waived, and the cause submitted to the court, evidence was offered for the purpose of showing the amount paid out by the plaintiff to its employee Herbeck up to and including January 23, 1925. The trial court, however, held that, under the mandate of the Appellate Court, the plaintiff was entitled to recover only such amount as was paid out up to the time that suit was started by The Tribune Company against the Emery Motor Livery Company. The trial court followed the mandate of the Appellate Court and it is not questioned that the judgment for \$324 was the correct amount actually paid out and due the plaintiff at the time of the commencement of the suit, but it is insisted that that court should have found in favor of the plaintiff for the total amount paid out up to and including January 23, 1925.

The decision of the Appellate Court in said cause, as rendered in the case of The Tribune Company v. Emery Motor Livery Company, Gen. No. 28217, and reported in Vol. 232 of the Appellate Court reports at page 309, is final and decisive of the question.

This court again reiterated the rule and reversed with directions in The Tribune Company v. Emery Motor Livery Company, 243 Ill. 627. These directions were explicit and binding upon the trial court, in that judgment was to be entered for the amount paid out up to the time suit was brought. The trial court had no power to enter any judgment other than one in conformity with the mandate of this court issued pursuant to the opinion of this court.

and the author would like to thank the referees for their helpful comments.

for the (copy number) held out up to the following amount
that that point should have been in favor of the plaintiff
the time of the commencement of the suit, but it is insisted
the matter cannot reasonably be said that the plaintiff at
that time is at the position that the defendant has been
charged. The trial court believed the evidence of the plaintiff
admitted in the finding whereby against the latter being found
that money as was paid out up to the time that was
disputed issue, the plaintiff was entitled to recover only

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assumed pursuant to the opinion of this court.

The fact that the court at the time that it rendered its opinions in these cases was differently constituted from the court now considering this appeal, does not alter the rule that those decisions are final and binding in so far as this particular case is concerned.

The Supreme Court of this State in the case of West v. Douglas, et al. 145 Ill. 164, in its opinion says:

"The rule is, that a decision of a case by an appellate court on the merits is final as to the matters decided, and is conclusive upon the parties upon a second appeal or writ of error in the same case. The points and questions thus considered and decided can not be again brought before such court for review, and cannot be reconsidered, except upon petition for a rehearing."

To the same effect was P.E.C. & St. L. Ry. Co. v. Gage, 286 Ill. 213, in which the Supreme Court says:

"Where a judgment is reversed by an appellate court the judgment of the appellate court is final upon all questions decided and these questions are no longer open to consideration. If the cause has been remanded, the court to which it is remanded can take only such proceedings as conform to the judgment of the appellate court. If specific directions are given the court can do nothing but carry out the specific directions."

The judgment of the Appellate Court and the mandate issuing pursuant thereto clearly directed the trial court to enter judgment in said cause for damages sustained up to the time of the starting of the suit and this court is bound by those specific directions and precluded from again reviewing said cause or entering any other judgment therein.

For the reasons stated in this opinion the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

HOLDEN, P.J. AND RYDER, J. CONCUR.

THE STATE OF NEW YORK: 1891.

THE TOWNSHIP OF BARNES, NEW YORK, HAS THE HONOR TO ANNOUNCE THAT IT HAS BEEN DECIDED TO HOLD AN ANNUAL MEETING ON THE 15TH DAY OF MAY, 1900, AT THE TOWNSHIP OFFICE, BARNES, NEW YORK, AT 10 O'CLOCK A. M. THE BUSINESS OF THE MEETING WILL BE THE REVISION OF THE TOWNSHIP CHARTER, AND THE TOWNSHIP WILL BE OPEN TO ALL CITIZENS OF THE TOWNSHIP TO ATTEND AND PARTICIPATE IN THE DISCUSSION OF THE MATTER. THE TOWNSHIP OFFICE IS LOCATED AT THE CORNER OF BARNES AND BROAD STREETS, BARNES, NEW YORK.

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1. The above information was obtained from a review of the files of the [redacted] and [redacted] and is being furnished to you for your information.

The judgment of the appellate court and the evidence in the case clearly indicate that the defendant was not guilty of the crime charged. The evidence is so conflicting and so contradictory that the jury should have been instructed to acquit the defendant. The court's judgment is reversed and the defendant is acquitted.

THESE ARE THE ONLY TWO COPIES OF THE DOCUMENTS IN THE COLLECTION OF THE NATIONAL ARCHIVES.

32802

BUFFALO WAX ENGRAVERS, INC.,

Appellee,

v.

WARREN HALL AND F. B. BELLIS,

Appellants.

256 X.A. 652

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Dec. 19, 1928

MR. JUSTICE WILSON delivered the opinion of the court.

The statement of claim of plaintiff, Buffalo Wax Engravers, Incorporated, is based upon a written contract dated October 9, 1924, and signed by the plaintiff, by Henry A. Nagel, Treasurer, and Warren Hall, the defendant, and payment of the account arising by reason of said contract, guaranteed by F. B. Bellis, also a party defendant to the action. Under this agreement the plaintiff, party of the first part, undertook to wax engrave 93 pages of Hall Shorthand Vocabulary Dictionary in a way satisfactory to the plaintiff for the sum of \$1,589.06.

The party of the first part further agreed to revise the defective plates of Hall Shorthand and to re-engrave them in a way satisfactory to the party of the second part. It is further provided by the agreement that it was to be an indivisible agreement and the receipt of \$300.00 was acknowledged in the instrument. It was further provided in said contract that the second party was to forward a check for the sum of \$421.06, at the time of the first installment of copy and the balance of the amount due was to

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be paid at later specified dates.

The defendant filed a set-off charging that the plaintiff had not fully performed the work and that, as the contract was indivisible, the defendant was entitled to the return of the money paid to the plaintiff.

A trial was had before the court without a jury, resulting in a finding by the court of \$500.00 in favor of the plaintiff and against the defendant and upon this finding judgment was entered, from which judgment this appeal has been perfected.

From the facts it appears that the plaintiff was to prepare and engrave 93 pages which were to be used in a publication known as Hall Shorthand and plaintiff was to further wax engrave 83 pages to be used in a publication known as Hall Shorthand Vocabulary and Dictionary. These pages were prepared and forwarded to the defendant and the book entitled, Hall Shorthand, was published. Defendant notified plaintiff on November 12, 1924, that 35 pages, specifying them, were not satisfactory to the defendant and requested the plaintiff to re-engrave the plates from which these pages were printed.

Defendant testified that no use was ever made of the plates furnished for the purpose of publishing Hall Shorthand Vocabulary and Dictionary, because these plates could not be used by the defendant. No complaint, however, was made by the defendant in regard thereto and the only complaint appears to be concerning the 35 pages already referred to.

be held as later specified below.

The defendant filed a petition charging that the
plaintiff had not fully performed the duty and that, in
the event the defendant, the defendant was entitled
to the return of the money paid to the plaintiff.

A trial was had before the court at about a year,
resulting in a finding by the court of fact, in favor of
the plaintiff was entered on the record and the case was
judgment was entered, from which judgment this appeal
has been perfected.

There was then a further trial the plaintiff was
to prepare and submit 22 pages which were to be read in a
petition made as will be shown in Exhibit A to
Further was entered 22 pages to be read in a petition
made as will be shown in Exhibit A and Exhibit B. These
pages were prepared and forwarded to the defendant and
the book entitled, "Bill of Rights", was submitted. Further
submitted plaintiff on November 12, 1934, was 22 pages,
specifying that, were not satisfactory to the defendant and
submitted the plaintiff to re-submit the same from which
these pages were taken.

Further plaintiff filed an answer and was held at
the place provided for the purpose of exhibiting Bill
Northwest Territory and Territory, because these places
could not be used by the defendant. It was held, however,
was held by the defendant to regard matters and the only
complaint against it to be submitted the 22 pages already

From the correspondence it appears that the plaintiff did not consider it necessary to re-engrave said plates, but offered to correct them so that they would be satisfactory. Defendant, on the other hand, apparently insisted that, under the contract, the plates were to be re-engraved and that it would be impossible to correct the old plates in such a manner as to show the lines and shadings necessary for use in a shorthand manual.

It is urged as grounds for reversal that the contract is indivisible and, not having been performed in a manner satisfactory to the defendant in its entirety, it was revocable and the plaintiff could not recover. It is further urged that the contract provided that the plates were to be re-engraved if found to be unsatisfactory and that the plaintiff had no right to perform in any other way. It is also urged that the finding and judgment of \$500.00 is not based upon any evidence showing the extent of damages, if any, sustained by the plaintiff and that the amount arrived at by the court was an arbitrary figure based upon no evidence.

From a reading of the contract we are in accord with the position of the defendant that the contract was an indivisible contract. On the other hand, it appears that the 35 plates of Hall Shorthand, in question, were used by the defendant in the publication of the volume entitled, Hall Shorthand; that a number of these published volumes were shipped to various people, that the defendant used some of them and that some of them were sold.

Then the correspondence is required that the State-
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If the defendant intended to reject the plates and stand on his rights under the agreement, it was his duty to have declared the agreement canceled and refrain from using any of the work furnished by the plaintiff. There was sufficient evidence in the record upon which the trial court could have made its finding in favor of the plaintiff on the ground that the defendant had not rejected the work, but by his conduct had accepted it and that his later rejection after demand for payment was unavailing. If the defendant had returned the plates, after having the manual printed and after having found that the work was unsatisfactory, and requested a re-engraving of the plates before shipping them out to various people and selling them to others, he would have been in a position where he could more properly have insisted upon his rights under the contract.

It is earnestly insisted that there was no basis upon which the court could assess the plaintiff's damages at the sum of \$500.00. We agree with counsel that it is difficult to ascertain upon what ground the court fixed the amount at \$500.00. On the other hand, the contract provided for the payment of \$1,569.06, and if the court found, as it evidently did, that the action of the defendant, in publishing, printing and circulating the publication in question, was an acceptance of the work under the agreement, then the total amount of the contract price, namely, \$1,569.06, would have been the measure of damages. After allowing credit for all payments made by the defendant, which amounts to the sum of \$757.00, there was still due, under the contract, the sum of \$832.06. While, as we have said, it is impossible to ascertain upon what ground the court arrived at the amount of \$500.00, in his finding and judgment, nevertheless, this

It is the intention of the Government to submit the bill
and stand on his right under the agreement, it was his
duty to have declared the agreement standing and waiting
from being any of the vote furnished by the majority.
There was nothing wrong in the treaty made with the
State Government which have made the finding in favor of the State
bill on the ground that the Government had not rejected the
bill, but by its conduct had accepted it and that the State
legislation after having the bill and the Government. It is
impossible that the bill, after having the bill
rejected and after having found that the bill was rejected
thereby, and therefore a re-consideration of the bill was
required. There was no reason why the bill should be rejected,
he would have been in a position where he could have
been satisfied with the bill under the contract.

It is extremely important that the bill be
passed which the State Government has rejected. It is
at the time of 1890, 1891. It is agreed with the bill that it is
difficult to determine what the bill should be. The bill should be
amount of 1890, 1891. On the other hand, the bill should be
for the payment of 18, 1890, and it was found, as it
entirely true, that the bill at the time, in 1890,
the bill was rejected. The bill was rejected in 1890,
was an acceptance of the bill under the agreement, that the
bill should be rejected. The bill was rejected, 18, 1890, and
have been the amount of 1890, 1891. After having found the
all payments made by the Government, the bill should be the
of 1890, 1891, and the bill was rejected, the bill
at 1890, 1891, as we have said, it is impossible to
determine what the bill should be. The bill should be
at 1890, 1891, in its first and payment, 1890, 1891.

is not a result harmful to the defendant in view of the fact that the judgment proper should have been for the balance remaining unpaid, namely, \$832.06. Under the circumstances the defendant is benefited, rather than harmed by the judgment of the trial court, and is precluded from urging as error the amount of the finding and judgment.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HOLDOM, P.J. AND RYMER, J. CONCUR.

The two women stated in this opinion, the judge

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32614

JENNIE EISENSTADT,

Defendant in Error,

v.

MARTIN LUKASZEWSKI,

Plaintiff in Error.

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2501A. 652²

ERROR TO

MUNICIPAL COURT

OF CHICAGO

Opinion filed Dec. 19, 1928

MR. JUSTICE WILSON delivered the opinion of the court.

The plaintiff Jennie Eisenstadt, obtained a judgment in the Municipal Court of Chicago for \$2,587.97, against Martin Lukaszewski, defendant, by confession on a certain note dated November 6, 1926, payable on or before March 1, 1928.

The judgment by confession was entered on December 24, 1926, and execution issued and was served December 31, 1926. Nothing further appears to have been done in the proceeding until June 1, 1927, at which time defendant filed a petition in said cause, praying that the judgment be vacated and set aside and the defendant be permitted to come in and plead.

The petition, signed by the defendant, stated as the reason for the delay in filing the petition, that petitioner is an illiterate man and did not know the significance of the execution issued on the 31st day of December, 1926 and, when he made an inquiry as to the meaning or purport of said execution, was advised by some party adversely interested, that the document was of no significance and that he should not pay any attention to it.

1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

8201A. 028

MULTIPLE CHOICE

Journal of Post Keynesian Economics

45

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

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10. The following table shows the number of people who attended the 2000 Summer Olympics in Sydney, Australia, by country.

1990

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Page 10 of 10

Figure 4. The polymerization of α -methylstyrene initiated by TiCl_4 in CH_2Cl_2 at -78°C .

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concentrations in humans are not sufficient to be considered a risk

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revisions to the 1995 program that will allow us to study the impact of the 1995 law.

The full text of this document is available at <http://www.fda.gov/oc/ohrt/>

Recherches de la zone de distribution et d'extension des zones abiotiques

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1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

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Source: Data collected from the 1990 Census. See text for details on data sources and methods.

SECRET

Source: *Encyclopedia of Connecticut*, ed. Paul F. Beitzinger, New Haven, 1973.

www.pearsoned.com.au and 011 800 087 263. More copies of this book are available from the publisher, Pearson Education, at 011 800 087 263.

of the interest rate

The petition further charges that he recalls placing his mark on a certain instrument; that his son-in-law, Stanley Kmiecik, was about to purchase a drug store and that one Al Kolin hurried into petitioner's residence on the evening of the signing of said note and demanded his signature to a piece of paper which the petitioner could not read and concerning the contents of which he was ignorant and that Kolin insisted that there was no personal liability connected with the signing; that the instrument in question was the note in judgment.

The petition further sets forth that he, petitioner, was at the time also requested to sign said note by his son-in-law, Stanley Kmiecik, whose name also appears upon the note in question as maker, and that he was persuaded to sign by reason of the pressure brought to bear upon him.

The petition further charges that petitioner has a good and equitable defense and that the note in question was obtained by fraud and deception and that there was no consideration therefor.

The reasons advanced in the petition for the purpose of evading delay in the filing of the same, do not appeal to this court. The fact that defendant, petitioner herein, is illiterate is not recognized in law as a reason for evading a judgment by confession on an instrument signed by such a person. The reasons advanced for the purpose of showing circumstances under which the note was signed are not sufficient in law to constitute fraud.

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the position is not a single and because the object is not a single.

The further general allegations in the petition, that the note was obtained by fraud and deception are mere conclusions, of the pleader. The note was a joint note, signed by the defendant and his son-in-law, and the question of consideration, under the circumstances in this case, is without force, particularly as there is no allegation that the other party to the note did not receive a good and valid consideration for the signing and delivery of said note.

For the reasons stated in this opinion, the order of the Municipal Court overruling the motion to vacate and set aside the judgment is affirmed.

ORDER OF MUNICIPAL COURT AFFIRMED.

HOLDOM, P.J. AND RYNER, J. CONCUR.

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Journal of Management Education 33(10):1039-1057

32820

ALFRED MILLER,

Appellant,

v.

JOSEPH A. METZNER,

Appellee.

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APPEAL FROM

CIRCUIT COURT,

BOON COUNTY.

Opinion filed Dec. 19, 1928

MR. JUSTICE WILSON delivered the opinion of the court.

Alfred Miller, plaintiff below, filed his suit in assumpsit against Joseph A. Metzner, defendant below, to recover the sum of \$2,055.63, claimed to be due by reason of certain transactions between the parties.

The declaration consisted of a special count upon a note for \$2,125 dated May 26, 1925 and the common counts with affidavit of claim for \$2,055.63. To this declaration the defendant filed a plea of the general issue and an affidavit of merits and, in the affidavit of merits, defended on the ground that the note had been signed in blank and that there had been certain payments and deductions and that the note did not express the proper amount that was due and payable. A jury was impaneled to try the issues, but, subsequently, a juror was withdrawn and the cause tried by the court, resulting in a finding in favor of the plaintiff in the sum of \$173.06, and judgment entered upon the finding. From this judgment plaintiff appeals to this court.

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From the facts it appears that prior to the time of the giving of the note, Miller was having some trouble with his wife and, as a result, divorce proceedings were pending and negotiations were being carried on between Miller and his wife with regard to a settlement of the property. It further appears that Miller and his wife were possessed of a certain piece of real estate and this was sold by them to the defendant Metzner for the sum of \$7,500. The plaintiff's share of the proceeds of the sale was paid to him by Metzner, less certain deductions, and the wife's share was paid to the bank to be held in escrow and to be paid upon the happening of an event certain. This "event certain" apparently being the entry of the decree.

It is urged on behalf of the plaintiff that in addition to this payment of \$7,500, the defendant agreed to divide with him the profits, in the event the property was sold by the defendant for a sum in excess of \$7,500. It appears further that the property was sold for \$9,000, and plaintiff's claim appears to be based mainly upon this transaction.

On January 29, 1927, the parties met by agreement for the purpose of drawing a new note in order to correct errors in the note of May 26th, 1925 and, at that time, a new note was drawn for \$1,235.63, but not signed nor delivered. At the time of this meeting in January, 1927, certain figures were prepared by the parties evidently for the purpose of arriving at the figure to be incorporated in the new note and the result of these figures amounted to \$1,235.63, the amount of the second note prepared, but not executed.

From the facts it appears that prior to the time of the living of the body, killed was having some knowledge with his wife and, as a result, certain knowledge was pending and negotiation was being carried on between them and his wife regard to a settlement of the property. It further appears that killed and his wife were concerned in a certain kind of real estate and this was said by them to the witnesses between the two on 11/20/31. The witnesses state at the beginning of the trial was said to him by killed, from certain documents, and the wife's words were said to the fact as he said in answer and in his words were the happening of an event certain. This "event certain" happened in being the wife of the husband.

It is noted in records of the District Court at Hamilton for this purpose of 11/20/31, the witnesses stated to killed and his wife, in the event the property was sold by the husband for a sum in excess of \$1,000. It appears further that the property was sold for \$1,000, and witnesses claim appears to be based solely upon their investigation.

On January 28, 1931, the parties met by agreement for the purpose of dividing the sum of \$1,000 as follows: to be given to the wife of \$500, \$500 was to be given to the wife of \$1,000, but not divided was delivered. At the time of this meeting in January, 1931, certain witnesses were present by the parties voluntarily for the purpose of dividing the sum to be transferred to the wife and the fact of this division was said by 11/20/31, the court at the moment was present, but not recorded.

There was no written memorandum of agreement between the parties to the effect that the plaintiff was to receive any part of the proceeds out of the re-sale of the property by the defendant. This is explained by the plaintiff, on the ground that he did not wish to have his wife know that he might possibly receive further compensation out of the property in addition to that amount which was received by them jointly at the time the property was conveyed by Miller and his wife to Metzner.

Before proceeding to trial the defendant admitted judgment to the amount of \$1,073.13. The court evidently arrived at the amount of the finding by deducting the amount of this confessed judgment from the sum of \$1,835.63, and adding the interest due upon said amount up to the time of trial.

It is unnecessary to consider the various items entering into the computation, but it is apparent that the court considered the figure arrived at January 29, 1927, as the correct amount due and owing the plaintiff after all just deductions in favor of the defendant.

The plaintiff's testimony consisted of his own evidence and exhibits and this testimony was refuted in a large part by the defendant and his exhibits. The court had an opportunity to see the witnesses and to observe their demeanor and manner of testifying upon the stand. The finding of the trial court is not manifestly against the weight of

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It is extremely important to consider the various factors which enter into the calculation, but it is apparent that the most important factor is the amount of money available for the project. The amount of money available for the project is the amount of money which is available for the project. The amount of money available for the project is the amount of money which is available for the project.

The Director's investigation revealed that the
subject was active in the Communist Party of the
United States of America and was active in the
National Student Reliance Fund. The subject was
also active in the National Student Reliance Fund
and was active in the National Student Reliance Fund.
The subject was active in the National Student
Reliance Fund and was active in the National
Student Reliance Fund.

the evidence and we see no reason for disturbing the finding and judgment of the trial court.

For the reasons stated in this opinion the judgment of the Circuit court will be affirmed.

JUDGMENT AFFIRMED.

HOLDOM, P.J. AND RYER, J. CONCUR.

the evidence and we are not aware of anything the contrary
and nothing of the kind.

The two women stated in their affidavits that
of the events which will be related.

REMARKS: [illegible]

REMARKS: [illegible]

32854

PEARL MOORE,

Appellant,

v.

WILFORD C. SHIPNES,

Appellee.

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250111 1152⁴

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Dec. 19, 1928

MR. JUSTICE WILSON delivered the opinion of the court.

The plaintiff, Pearl Moore, filed her declaration in the Superior Court, claiming damages against the defendant Wilford C. Shipnes, by reason of personal injuries sustained by the plaintiff on or about the 23th day of March, 1925.

To this declaration the defendant filed general and special demurrers, which were sustained by the court and, thereupon, plaintiff elected to stand by her declaration and judgment was accordingly entered against her and in favor of the defendant. From this judgment this appeal is perfected.

The declaration consists of one count and charges that the defendant owned certain premises located at 1313 West 61st street in the City of Chicago and County of Cook, and upon said premises was situated a certain building with flats located therein for dwelling purposes.

Charges further in the language of the pleader, "that the same time and theretofore the said premises and flats were then and there in the lawful occupancy of a certain Sam Hutchins and were occupied by the said Sam Hutchins; that

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the plaintiff here lived with the said Sam Hutchins as his housekeeper or hired girl."

Charges further that there was on the back porch of the second floor a certain balustrade to protect the porch and stairway and to guide against people falling therefrom. It is evident that the word, "guide" as used in the declaration was used inadvertently. It was probably intended to be "guard". On demurrer however it must stand as written.

The declaration further charges that the plaintiff, and other people lawfully present in said building, had used the said porch and the said balustrade for a period of to-wit: one year, with the knowledge and consent of the defendant; that said balustrade and porch remained at all times under the ownership and control of the defendant and were never under the control of the plaintiff; that they were at all times used in common by the various persons lawfully on said premises and that none of said persons lawfully present had any right or control of any part of said premises nor the appurtenances thereto, nor the said balustrade and porch.

Charges that it became and was the duty of said defendant to keep said porch and balustrade in a reasonably safe condition for persons who might be lawfully upon said premises; charges further that the plaintiff was lawfully at the place aforesaid and that the said back porch and balustrade were in a dangerous, loose and decayed condition prior to and after the time the plaintiff had occupied the premises; charges that the said condition was well known to the defendant, or should have been by the exercise of due care; charges that, while the plaintiff, in the exercise of due care for her own

The plaintiff here lived with the defendant at 125
 Broadway at New York City.

George Taylor told him - on the same date -
 the second time a certain defendant is named in the
 and stated that he had again made a similar statement.
 It is stated that the said "George" was in the defendant's
 and was in the defendant's. It was further stated that he
 "George" in the defendant's house if he was in the house.

The defendant further showed that the plaintiff
 and other people actually present in said building, and that
 the said group was the same defendant on a number of occasions;
 and that, with the plaintiff and several of the defendants;
 that said defendant was never present at all times when
 the plaintiff was present at the defendant's and only when
 under the control of the plaintiff; that they were at all times
 and in contact with the various persons present in said building
 and that some of said persons actually present had the right
 to control in any way of said building and the surrounding
 property, and the said defendant and others.

George told it further that on the day of said
 defendant he had been present and defendant is a trustworthy
 and verified for between the night he leaving from said
 defendant; George further told the plaintiff was in the
 the same defendant and that the said defendant was in the
 was in a defendant, James and several persons, and to the
 after the time the plaintiff had changed the defendant; George
 that the said defendant was well known in the defendant, and
 should have been by the control of the said defendant that
 while the plaintiff, in the defendant of the said defendant and

safety, was proceeding upon said back porch, she was, because of the breaking of said balustrade, precipitated to and upon the ground below and was greatly injured.

Three special demurrers, in addition to the general demurrer, were filed to said declaration. The second special demurrer charges that the declaration does not show the character of the occupancy of the premises by the plaintiff or her employer. The third demurrer charges that the allegations of the declaration, purporting to allege the defendant's connection with the premises in question, are mere conclusions of law.

From a reading of the declaration it is impossible to ascertain whether Sam Hutchins or the defendant was in control of the premises at the time of the accident and the declaration was, therefore, subject to the special demurrer. The declaration charges that the premises were lawfully occupied by Sam Hutchins and that the plaintiff lived with him at the time as his housekeeper. This allegation might mean that he was a lessee of the entire building, or it might mean that he was a mere licensee. If he was the lessee, then he was liable for the condition of the premises without an allegation to the effect that, when the property was leased, there was a nuisance which was in existence, or that such lessors and owners of said premises had covenanted to remove or repair said condition. Marcovitz v. Hergenrether, 302 Ill. 162.

If the said Hutchins was a licensee and in the possession of the premises lawfully but by sufferance, then a different question arises and the defendant had the right to be advised as to that particular fact.

From a reading of the declaration it would appear that Sam Hutchins was in possession of the entire building and there is no allegation in the declaration to the effect that there were other tenants in the building who used the back porch and balustrade in question in common.

So far as it appears from the declaration, the said Sam Hutchins was the sole occupant of the building, even though there is an allegation to the effect that there were other people upon the premises. A pleading upon demurrer must be taken most strongly against the pleader and mere conclusions of fact or law will not suffice, as a demurrer does not admit mere conclusions. The declaration as we read it is ambiguous and uncertain and subject to demurrer.

For the reasons stated in this opinion the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HOLDON, P.J. AND RYKER, J. CONCUR.

From a reading of the evidence it would appear that the evidence is in possession of the entire railroad and there is no objection to the evidence in the witness that there were other persons in the building and that the best view and belief in question is correct.

So far as is known from the testimony, the same has been made and the same amount of the building, and there is no objection to the witness that there were other persons in the building. A building with many more people than the witness could see and hear and was not in the building at that time and was not in the building at that time. The building is in the best view and belief in question is correct.

For the reasons stated in this opinion the judgment of the Superior Court is affirmed.

THOMAS H. HILL,

ATTORNEY AT LAW, ST. LOUIS, MO.

32860

JOSEPH S. KNEE,
Appellant,

v.

LONDON GUARANTEE &
ACCIDENT COMPANY, Ltd.,
a corporation,
Appellee.

250 I.A. 652
APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Dec. 19, 1928

MR. JUSTICE WILSON delivered the opinion of the court.

Plaintiff Joseph S. Knee, filed his suit in the Superior Court upon a policy of burglary insurance against the defendant London Guarantee & Accident Company, Ltd., a corporation. To this declaration the defendant filed a plea of the general issue and several special pleas. The principal question involved appears to be a dispute as to whether the burglary, in fact, was committed. The cause was tried before a jury and the issues were found in favor of the defendant and against the plaintiff. A motion for a new trial was overruled and judgment entered on the verdict for costs against the plaintiff. From this judgment this appeal was taken.

The principal assignment of error relied upon for reversal appears to be that certain police reports were permitted to go to the jury over the objection of the plaintiff and particularly upon the ground that these police reports were not read in evidence before they were handed to the jury upon its retirement from the box for the purpose of considering its verdict. It is also insisted that there was error in the

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Franklin County

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A copy of the report may be found in *Green of the Northwest*

and against the National Rifle Association, I believe the NRA is a very

Further work will continue with the parallel development of the system.

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with some delays, some to administrative changes, and

continued response to the 1992 election results will be

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permitting of certain other exhibits to be taken by the jury to its jury room when it retired to consider its verdict. It is also urged as error that the court erred in refusing to give two certain instructions offered on behalf of the plaintiff.

During the course of the trial plaintiff called as his own witness, one Cornelius Coakley, who was a police officer of the City of Chicago. This witness testified on direct examination that he was notified of the burglary in question and proceeded to plaintiff's residence, where he found the house in disorder. He testified further that he went to the back door and found a glass broken in the door through which a man could reach his hand and open the door. On cross-examination he was asked whether or not he had made a report, and stated that he had. He was handed a copy which he stated was a correct copy of same and which was marked Defendant's Exhibit One for identification. He testified further that the broken glass referred to was on the outside of the door.

Robert Hunt, a witness called by the defendant, testified that he was a police officer and went to the residence of the plaintiff with Officer Coakley and found the glass lying on the porch outside of the door. He testified further that the plaintiff refused to give him a description of the articles taken and that he made a written report which was marked Defendant's Exhibit Two for identification. This report appears to have been the original, which was brought by the witness from the files of the police station. Neither of these exhibits was read to the jury and it is earnestly argued on behalf of the plaintiff that it was error to permit them to go to the jury.

...of certain other matters in the case of the law
to the fact that it is not to be considered as a
is also noted as being that the court is not to be
five for certain reasons which are stated in the
plaintiff.

During the course of the trial the plaintiff called in
his own witness, one William G. Smith, who was a witness of
the fact of the matter. This witness testified as follows:
Examination: That he was notified of the hearing in the
and proceeded to the plaintiff's residence, where he found the
house in question. He testified further that he went to the
back door and found a glass bottle in the back porch which
he took with him and went to the court. He testified that
there he was shown evidence and that he saw a receipt, and
stated that he saw. He was asked a very short time after that
a receipt copy of some and said he would deliver it to the
one for investigation. He testified further that the same
place referred to was in the office of the bank.

Robert Smith, a witness called by the defendant,
testified that he was a police officer and went to the residence
of the plaintiff with William G. Smith and found the glass
bottle on the porch outside of the house. He testified further
that the plaintiff refused to give him a receipt for the
bottle and that he made a return report which was
mailed to the police. He testified further that the same
evidence is now in the office, which was brought by the
attorney from the office of the police station. Further of these
evidence was sent to the jury and it is respectfully urged as
evidence of the plaintiff that it was given as evidence to the
to the jury.

We have examined the record and abstracts and nowhere find that these two documents were admitted in evidence, nor do we find that they were ever given to the jury for its consideration upon its retirement for the purpose of considering its verdict.

At the end of the defendant's case it offered in evidence Defendant's Exhibits 2, 4, 5, 6, and 7. Exhibit No. 2, was the original police report. Exhibit No. 1 does not appear to have been offered. The court in passing upon this offer, said: "They may go in. And as to defendant's exhibit 2, the objection is sustained." To this ruling of the court the defendant preserved an exception.

At the conclusion of the argument the court gave the jury certain instructions in writing and the jury was directed to retire to consider its verdict. The court thereupon directed the bailiff to take the exhibits to the jury room and counsel for the plaintiff thereupon objected. The ruling appears to be as follows, as contained in the bill of exceptions: "Objection overruled. Let the Exhibits that have been admitted in evidence be handed to the bailiff to take with him to the jury room." Counsel for the plaintiff thereupon preserved an exception.

If the fact was that these reports did go to the jury for its consideration, and it did not appear in the record or bill of exceptions, that fact should have been preserved by an additional bill of exceptions in order to bring the matter to the attention of this court. So far as this record is concerned, not only does it not appear that they went to the jury, but the inference to be drawn from the record is that these police reports, Exhibits Nos. 1 and 2, did not in fact go to the jury.

Exhibits 4, 5, 6 and 7, which apparently did go to the jury, were certain signed statements of the plaintiff, himself, which were properly introduced in evidence for the purpose of showing that these statements, which were supposed to be original lists of articles lost by the burglary, did not correspond with a subsequent list furnished to the insurance company. It was not error to permit these lists to go in as exhibits, and, consequently, not error for the jury to take them with it at the time it retired to consider its verdict.

It is further urged that the court committed reversible error in refusing to give plaintiff's instructions, "A" and "C". These two instructions related to the question of damages. The jury, having found in favor of the defendant, was never called upon to consider the question of damages. Moreover, the instruction directed the jury to find for a specific amount if they should find the issues in favor of the plaintiff. Such an instruction is applicable where such an amount is liquidated and certain, but not where it is unliquidated and the subject of proof. We are again confronted with a situation which is not helpful to the court in that, upon an examination of the abstract, we find that instruction "A", while contained in the abstract under the heading "Refused", appears in the abstract to have been marked "Given". Moreover, this court is not required to go to the abstract or record to find an instruction which it is urged in the brief is erroneous, or its refusal error. The instruction should be set out in the brief, together with the grounds upon which is predicated error in the giving or refusal of such an instruction.

Exhibits 4, 5, 6 and 7, which apparently are the
 the jury, were certain signed statements of the deceased,
 himself, which were previously furnished to witnesses for the
 purpose of showing that these statements, which were furnished
 to be original lists of articles lost by the deceased, are
 not substantiated with a subsequent list furnished to the
 deceased himself. It was not shown to which these lists were
 given in an exhibit, and, consequently, the jury was not
 to take into account at the time it reached its verdict the
 verdict.

It is further stated that the jury reached its
 verdict after it reached its verdict in the case of the deceased,
 and "P. These two statements relate to the deceased and
 deceased. The jury, having found in favor of the deceased,
 was never called upon to consider the question of the
 deceased, the instruction directed the jury to find that a
 specific amount of loss should be found in favor of the
 plaintiff. Such an instruction is completely wrong and an
 amount is indicated and certain, but not where it is certain-
 and not the subject of proof. We are again confronted with
 a situation which is not helpful to the jury in that, when
 on examination of the exhibits, we find that the deceased "P.
 while confined in the hospital under the heading "Deceased",
 appears in the exhibit to have been named "Living". Deceased,
 this must be not removed as to the exhibit of items to
 find an instruction which is in error in the fact in testimony,
 in the actual event. The instruction should be not only in the
 brief, together with the exhibits which is unchanged with
 in the finding is stated in words as indicated.

We do not consider that there was such error in the refusal of the instructions as would constitute reversible error, particularly in view of the fact that the jury was instructed that if it should not find the issues in favor of the plaintiff, it would not be necessary for them to consider the question of damages. By their verdict the jury found the issues in favor of the defendant and the question of damages was not necessary for their consideration under any form of an instruction.

The jury heard and considered the evidence and was in a position to observe the manner and demeanor of the witnesses while upon the stand, and its verdict should not be disturbed.

For the reasons stated in this opinion, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HOLDOM, F.J. AND RYHER, J. CONCUR.

we do not consider that there was any error in the
method of the investigation as well as in the results
obtained, particularly in view of the fact that the only
test made was that of the blood in the urine in the
presence of the blood, it would not be surprising that the
analysis of the blood, by which means the only means
the blood in the urine of the defendant was the presence of
the blood in the urine, for which no other evidence was
shown to be sufficient.

The only other evidence in the case was the
in a number of cases the blood was found in the
urine of the defendant, and the result of the
analysis was as follows:

For the reasons above it is held that the
of the defendant is sufficient.

THE COURT THEREUPON

ORDERED, that the

33026

JOSEPH H. FREE,
Appellee,

vs.

THE SUCCESSFUL MERCHANT,
a Corporation,
Appellant.

250 I.A. 653

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The complainant, Joseph H. Free, filed an amended and supplemental bill, in which he alleged that on June 19, 1931, he had entered into negotiations with Charles Lane Bowes, who represented himself to be the owner and controller of the Successful Merchant, Inc., a corporation of Illinois, and General Millwork Company, a corporation of Maine, and that complainant was employed as salesman, sales manager and solicitor for said Bowes personally and said corporations, as well as for another department known as the Architectural and Publicity Bureau. The bill set up that complainant entered upon this employment and performed services thereunder, but that the two corporations and Bowes combined and federated together to fraudulently prevent payment of commissions earned by him. The various services performed and conduct of defendants in that connection are set forth at length in the bill which prays for an injunction, a receiver, a discovery, an accounting and for further relief.

Bowes, the General Millwork Company and the Successful Merchant were made parties defendant, were summoned, appeared and answered. The cause was put at issue and the court heard evidence as stated for the purpose of finding out "what the contract is between these parties, ascertain their rights, and the testimony should be limited to that, and if the court decides the bill is good and entitled to any accounting under it, that is a matter we will get into later."

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1. The first group of countries is the "Group of 10" (G10), which includes the United States, Canada, France, Germany, Italy, Japan, the Netherlands, the United Kingdom, Sweden, and Switzerland. These countries are the largest industrialized nations and have the highest per capita income.

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Source: The author's field notes.

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

There are two main reasons for this. First, the model is not a good representation of the real world. Second, the model is not a good representation of the real world.

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continued to believe these people, especially their claims, and the

any further action will be taken, until at least a further review is required.

U.S. DEPARTMENT OF AGRICULTURE

*total and per litre of water

Evidence was produced by the complainant but none was submitted by the defendants, and the court entered a decree finding "that Joseph M. Free and The Successful Merchant, a corporation, entered into a verbal agreement whereby the complainant became employed and was employed by the defendant as sales manager, salesman and solicitor and entered upon said employment for the disposition and sale of goods and merchandise of the defendant in the City of Cincinnati, Ohio, on June 15, 1921, and so continued in said employment continuously until November 25, 1923." After reciting the facts as to various agreements between complainant and the Successful Merchant, a corporation, the record shows:

"The court further finds that no true, complete and accurate account has been had between the parties hereto.

It is therefore ordered, adjudged and decreed that the allegations of the amended and supplemental bill of complaint are substantially true as alleged and charges; that the equities are with the complainant, Joseph M. Free, and against the defendant, Successful Merchant, Inc., and the court orders said defendant to render said complainant a full, true and complete accounting of all of the acts and things between said parties by themselves, their agents, servants, and attorneys and solicitors from said time of employment, commencing June 15, 1921, to its termination until November 25, 1923."

By a further provision the decree directs a reference to a master in chancery to state an account, and further orders, adjudges and decrees that either of said parties shall be at liberty to apply to the court for further instructions and directions as may be required.

Bowes and the two corporations appealed from this decree jointly and severally, which appeal was perfected, however, by the Successful Merchant alone.

The complainant has made a motion in this court to dismiss the appeal on the ground that the decree entered was interlocutory and not final. As against this contention the defendant urges the general rule that a decree which finally disposes of the rights of the parties is final, although it may direct an account, and a number of well known cases are cited, including Rhodes v.

Ashurst, 176 Ill. 381; Johnson v. Northern Trust Co., 265 Ill. 263; Eich v. Cservenko, 330 Ill. 455, and Bennett v. Woolsey, 160 Ill. App. 587.

After a careful examination of the decree, we are constrained to hold that the decree is interlocutory and not final, for the reason that it does not assume to pass upon the rights of all the parties to the proceeding. It will be noticed that the only finding as to the merits is against the corporation, the Successful Merchant, and that the decree does not dispose of the rights of the other defendants. The appeal must therefore, we think, be dismissed on the authority of Barnes v. American Brake Beam Co., 238 Ill. 582, and other cases cited in that opinion.

The motion is therefore granted and the appeal dismissed.

APPEAL DISMISSED.

O'Connor, P. J., and McDurely, J., concur.

32790

LEWIS A. STEBBINS, PAUL C.
L'AMOREAUX, J. E. HURTUBISE
and JAMES C. BYRNE, copartners,
etc.,

Appellees,

v.

B. B. BALLARD & CO.,
a corporation,

Appellant.

250 L.A. 653²

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRIBBY DELIVERED THE OPINION OF THE COURT.

In an action to recover for attorneys' fees and cash disbursements in an insurance litigation there was a trial before a jury in February, 1928, resulting in a verdict and judgment against defendant for \$11,000.36, and this appeal followed. Plaintiffs' total claim was for \$13,035.12, of which \$353.20 was for cash disbursements. The fees charged were for services claimed to have been rendered after July 1, 1927, and for a percentage of 1-3/4 per cent on \$316,400 received by defendant in a settlement of the litigation. The amount allowed by the jury's verdict was \$1968.76 less than plaintiffs' total claim.

Plaintiffs' declaration (to which defendant filed a plea of the general issue together with an affidavit of merits by its president, Homer B. Ballard) consisted of a special count and the common counts. In the special count it is alleged in substance that plaintiffs were a firm of attorneys, practicing in Chicago; that in March, 1926, Hollin Ballard, a resident of Minneapolis, Minnesota, came to his death from carbon monoxide poisoning; that he had taken out a number of policies of life insurance, some payable to his wife,

some to defendant, and some to other corporations with which he had been connected; that some "were within the contestable period," and defendant by proper procedure had acquired the interests of the beneficiaries in all of such policies, which amounted at their face to more than half a million dollars; that the companies had refused to make any payments on them, contending that the insured had committed suicide; that in April, 1926, Lewis A. Stebbins, one of the plaintiffs, had negotiations with Homer Ballard, president of defendant, concerning its employment of plaintiffs, as attorneys, to collect from the insurers on such policies; and that as a result Stebbins, on plaintiffs' behalf, on April 22, 1926, made to Ballard, as president, a proposition in writing as a basis for plaintiffs' compensation for their services to be rendered, substantially as follows: (1) a retainer fee of \$10,000. (2) For office work done by Stebbins, individually, \$150 a day, and \$75 a day "for work of juniors." (3) For court work, and any work outside of the city, \$200 a day, if done by him, individually, and \$100 a day if done by juniors. (4) Three to five per cent of whatever recovery might be had. That to this proposition Ballard replied by letter from Minneapolis on April 25th, writing in part that "we would like to have a somewhat more definite understanding as to the maximum expense which we shall be under," that four situations should be considered, viz, (1) a settlement, (2) trial in the lower court, (3) an appeal, and (4) a settlement after trial or appeal, that "in the event of a settlement, we will pay you, in addition to a retainer of \$10,000, for preparation at the per diem rates mentioned in paragraph 2 of your letter of April 22nd, but not to exceed \$5,000, and in addition thereto 1-3/4% of the aggregate amount received from the several insurance companies in settlement," that, of course, "we

some to estimate, and some to other organizations - and some to be
 been announced; that some "were within the committee's power," and
 influence of proper persons had secured the interests of the
 beneficiaries in all of these matters, - and some to be
 to more than half a million dollars; that the committee had refused to
 make any payment on them, considering that the interest and commission
 would be lost in "pull, push, and shoving," and of the plain-
 tiffs, and negotiations with some persons, friends of defendant,
 concerning the management of plaintiff, as defendant, in order
 from the interest in such matters, and that as a result defendant,
 as plaintiff's agent, on April 10, 1901, made a statement, as provided,
 a proposition in relation to a basis for plaintiff's compensation for
 their services to be considered, substantially as follows: (1) a certain
 fee of \$10,000. (2) For office, such time for traveling, subsistence,
 food, and other expenses as might be incurred. (3) For each case
 and any other services at the time, 10% of the fee in each instance.
 (4) For each case at the time, 10% of the fee in each instance.
 of relative interest might be had. That in this proposition plaintiff
 replied by letter from Chicago, dated April 10, 1901, stating in part
 that "we would like to have a somewhat more detailed understanding as
 to the various expenses which we shall be liable for, and that
 should be considered, viz: (1) a retainer, (2) office and travel
 costs, (3) an appeal, and (4) a settlement after trial or appeal,
 that "in the event of a settlement, we will pay you, in addition to a
 retainer of \$10,000, the percentage of the net proceeds realized
 in paragraph 1 of your letter of April 10, 1901, and also \$10,000,
 and in addition thereto 1-1/2% of the aggregate amount realized from
 the several lawsuits deposited in settlement," that, at which, we

are treating all of the claims as though handled as one claim," and that, "in the event of a settlement for the full amount of all the claims, you would receive the \$10,000 retainer, not to exceed \$5,000 for your per diem work, and \$10,000 for the 1-3/4%, or a total of \$25,000," that "in the event of a trial or trials, we will pay you, in addition to the \$10,000 retainer, per diem compensation on the basis set out in paragraphs 2 and 3 of your letter of April 22nd, but not to exceed in the aggregate \$7,500, and we will pay you 3% of the aggregate amount recovered from the several insurance companies after trial;" and that, after stating what payments would be made after an appeal, etc., Ballard wrote, in conclusion, that, "if the suggestions contained in this letter meet with your approval, you may wire me and I will see that remittance of the retainer is made immediately." That in reply to this letter Stebbins, on April 27, 1926, telegraphed to Ballard in part as follows:

"Letter concerning compensation received. Terms satisfactory with following suggested amendments. In case of litigation time put in may be very great and the per diem should (not) be limited, but if it runs over \$7500 will credit you with half of retainer, \$5,000, on the per diem, and not charge any additional per diem until it exceeds \$12,500. Accident policies involve very different questions and * * should be made the subject matter of separate agreement, * * ."

It is further alleged that on April 29th plaintiffs received a letter from defendant, by J. C. Benson, its attorney at Minneapolis, in which defendant's check of \$10,000, payable to plaintiffs' order, for the retainer fee was enclosed, and in which it was stated that it was the understanding that plaintiffs were to commence actions on all life policies at once, that plaintiffs' "per diem is to be computed as suggested in Mr. Stebbins wire of April 27th," and that "the arrangement as now concluded does not cover any litigation on

accident policies;" that plaintiffs commenced the actions on the life policies, and that thereafter from time to time and up to July 1, 1927, rendered legal services to defendants for which they from time to time rendered bills, which bills defendant paid; that commencing July 1, 1927, and continuing during that month and the months of August, September and October, 1927, plaintiffs rendered other legal services to defendant, "in the handling of said litigation and in pursuance of the terms of said contract," for which they have not been paid, viz, for July, \$3,337.30, for August \$1,229.17, for September \$1,900, and for October \$685.25, or a total of \$7,151.92; that all litigation was settled during the month of October, 1927, for the amount of \$316,000, and that plaintiffs under the contract also are entitled to 1-3/4% on said amount, or the sum of \$5530; that plaintiffs also are entitled to be reimbursed for certain cash disbursements, made during September, October and November, 1927, aggregating \$353.20; and that defendant, although often requested, has refused to pay said sums, etc.

Upon the trial plaintiffs introduced the letters and the telegram which passed between the parties in April, 1926, and which formed the contract. All four of plaintiffs' firm testified, as did Paul Keller, one of their assistants. Homer Ballard alone testified for defendant, and Mr. Stebbins testified in rebuttal. A mass of documentary evidence was introduced.

It appears from the evidence in substance that immediately after the making of the contract separate actions on seven life policies were commenced in the Superior court of Cook county, two of which were removed to a Federal court; that in the other five, after the pleadings had partially been settled and lengthy depositions taken, motions had been

particulars have been set out in the following table, which has been
sent to a Special Committee in the early part of the month and
submitted to the Legislative Council of New South Wales, the
the result of the various inquiries which are being made into
the matter. It appears from the evidence in evidence that immediately after
the various inquiries were completed.

entered for Homer Ballard, as president, to produce for inspection all books, records, etc., of the different corporations of which Rollin Ballard had been connected in his lifetime, and upon the theory that an examination of them would show a motive on the part of Rollin Ballard for his having committed suicide, as claimed; that in the litigation plaintiffs, up to July 1, 1927, had rendered many legal services, for which they had forwarded bills to defendant (exclusive of the retainer of \$10,000) in the aggregate sum of \$38,066.66, and which bills had all been paid by defendant; that in one of the statements rendered, and after the total of the per diem charges had exceeded \$7,500, plaintiffs gave defendant a credit for \$5,000 for half of the retainer fee, in accordance with the terms of the contract; that shortly after July 1st the right of the insurance companies to an examination of the books, etc., was argued upon objections previously filed, and the objections were overruled by the Superior court; that an answer of Homer Ballard to the rule, in each of the five pending cases was drafted and filed; that on July 14, 1927, in one of the cases, an order was entered that Ballard produce the books, etc., but he did not do so; that in subsequent proceedings he was adjudged guilty of contempt and ordered imprisoned until he should comply with the order, from which judgment plaintiffs, as attorneys, perfected an appeal for him; that like proceedings were had and like orders entered in the other four cases; that plaintiffs prepared and filed two bills of exceptions, one concerning the proceedings on the motion to produce the books, etc., and the other concerning the contempt proceedings; that they also presented a motion to the executive committee of the court for a re-assignment of the five cases on the calendars of different judges, it appearing that

all cases had been put by the clerk on the calendar of one judge, contrary to rules concerning rotation of cases; that they also caused certain amendments to the pleadings to be made; that early in July they forwarded to defendant a bill, aggregating \$4,100, for per diem services rendered during the month of June, concerning which Ballard wrote that defendant felt that it was "excessive" and requested a "substantial downward revision of same;" that Stebbins replied on July 12th, justifying the charges, but saying: "I leave the matter entirely to you; you can write your own ticket and send us such amount * * as you may see fit;" that defendant, however, afterwards paid said June bill, but did not thereafter pay any further bills; that for the claimed services rendered from July 1st to July 20th plaintiffs charged \$3,164.89, and for services rendered during the balance of the month \$178.91, as per bills forwarded, or a total for the month of \$3,343.80; that for the months of August, September and October, 1927, the total sum of \$3814.42, making the aggregate charges for services rendered subsequent to July 1st, \$7,158.22; that plaintiffs also charged defendant for disbursements made from September 7th to November 9th the sum of \$353.20; that in August Ballard wrote Stebbins that the total bills for services during July "exceeded justifiable limits," to which letter Stebbins replied, again suggesting that Ballard "write his own ticket;" that Ballard also wrote letters complaining of the excessive charges made in the bills rendered for the months of August and September; that in September negotiations were commenced with the insurance companies looking to the settlement of all pending litigation, which resulted in defendant receiving in settlement of its claims upon the policies the sum of \$316,000; that in addition to the above charges for services and disbursements plaintiffs claimed upon the trial that

they were entitled to 1-3/4 per cent of said sum, or \$5,530, - making their total claim \$13,035.12; that they did not, however, present any evidence showing the reasonableness or the necessity of the charges aggregating \$7,151.92, but only introduced evidence tending to show that the amount of time as mentioned was actually consumed in doing the work; and that there was evidence showing that some of these per diem charges were based upon the theory, or claimed local custom among Chicago lawyers, that six hours was a day, and that when any member of plaintiffs' firm, or any assistant, put in more than six hours on any one day in working on a particular matter in connection with the litigation, more than a charge for one day was made, and the time expended over six hours was treated as if it had been expended on another day.

The main contention of defendant's counsel is that the verdict and judgment are excessive, because (1) under the terms of the contract defendant should have been credited with the other half (\$5,000) of the whole retainer of \$10,000, as against any proper per diem charges; (2) as to some of the per diem charges unnecessary time was expended in rendering the services, and there was no reasonable necessity for their rendition; and (3) in some instances more than the stipulated per diem rates were charged on the theory that six hours constituted a day's work by custom among Chicago attorneys, but there was no evidence that defendant had any knowledge of such custom and, hence, could not be bound by it, even if it existed.

As to point (1) above, we are of the opinion that defendant under the original contract should have been allowed by the jury another credit of \$5,000 on said paid retainer fee of \$10,000. In Stebbins' wire of April 27, 1926, to Ballard's letter or proposition of April 25th, (placing limits on the total per diem charges) he said:

they were entitled to 1-1/2 per cent of this sum, or \$4,166.67, making their total claim \$11,000.00. That they did not, however, present any evidence showing the reasonableness of the necessity of the charges appearing \$7,833.33 but only introduced evidence tending to show that the company at that time was actually insolvent in which the court said that there was evidence showing that some of those persons charged were based upon the theory, or stated facts which would justify I think, that the company was a debt and that they were entitled of plaintiff's claim on the balance, but in view of the fact that on one day in 1914 on a particular date in connection with the liquidation, there was a charge for the use of water, and the time expended over the same was calculated at 12 and 1/2 hours per day.

The main question of reference is raised in that the utility and judgment are essential, because (1) under the terms of the contract, should have been credited with the other half (\$7,500) of the value retained of \$15,000, as against the payment for the charges; (2) as to some of the charges which are undoubtedly, and are regarded as including the services, and there are no reasonable necessity for their retention; and (3) in some instances where the charges are shown to have been charged on the theory that the company was a debt by reason of the fact that it was insolvent, but there was no evidence that defendant had any knowledge of such fact and, hence, would not be bound by it, even if it existed.

In no point (2) above, as one of the parties had introduced under the original contract should have allowed by the jury another credit of \$7,500 on the basis of the fact that the \$15,000, in addition, was of April 17, 1914, to plaintiff's failure to pay the \$7,500, (showing that on the total per cent charges) be added

"Terms satisfactory with following suggested amendments. In case of litigation * * the per diem should (not) be limited, but, if it runs over \$7,500, will credit you with half of the retainer, \$5,000, on the per diem, and not charge any additional per diem until it exceeds \$12,500." This amendment was agreed to by defendant, in its letter, per Benson, of April 29th, and it appears that when plaintiffs' per diem charges had reached a figure in excess of \$7,500, they credited defendant in a certain bill rendered to it with \$5,000, and defendant paid the bill less the credit. It also appears that thereafter plaintiffs continued to render monthly bills for other per diem charges, which in the aggregate considerably exceeded \$12,500. Under the contract they should not have rendered any further bills for per diem charges until the total thereof, including the \$7,500, had reached \$12,500. Had such bills not been rendered, defendant would in effect have been credited with a second \$5,000 on the paid retainer fee of \$10,000, which credit, according to the accounts in evidence, it never received. It is by virtue of the terms of the contract that, in addition to the unpaid per diem charges, plaintiffs claim the 1-3/4 per cent on the final settlement of the litigation before any trial upon the merits, or \$5530, and the size of the verdict in the present cause indicates that the jury allowed the claim. It seems clear to us (the total per diem charges being considerably in excess of \$12,500) that the verdict, on account of this item alone should have been \$5,000 less than it was.

As to the claimed excessiveness of the verdict, concerning the unpaid per diem charges for services rendered by plaintiffs after July 1, 1927, plaintiffs' counsel has seen fit in his printed brief to itemize the charges as to their subject matter, as follows:

The services for which suit was brought are:

| | |
|---|------------|
| 1. Services from July 1st to July 20th, 1927, which plaintiffs <u>claim</u> are not in dispute | \$3,164.59 |
| 2. Services in connection with the effort of the insurance companies to secure an examination of the books of defendant and allied companies. | 1,981.25 |
| 3. Services for amending the pleadings | 175. |
| 4. Services in connection with the petition to the Executive Committee of the Superior court | 691.67 |
| 5. Services in connection with the settlement of the insurance litigation | 1,006.25 |
| 6. Miscellaneous services | 206.25" |

The total of these items is \$7,225.01, a slight excess over the claim as stated in plaintiffs' special account, \$7,182.92. The items are the subject of a lengthy discussion in opposing counsels' briefs. It is evident from the jury's verdict that some portions of these items were not allowed, as the verdict is \$1968.76 less than plaintiffs' total claim, but it is impossible even to conjecture what items, or what portions of an item, were not allowed. No useful purpose will here be served in detailing the evidence concerning these items or the respective contentions made by opposing counsel relative thereto. Suffice it to say that we have reached the conclusion, after considering the evidence bearing upon them and the contentions and arguments of counsel, that the verdict is excessive in the additional sum of \$2,000, because unnecessary time was expended in the rendition of some of the services charged for and, in some instances, there was no reasonable necessity for the services, and because, in other instances, the per diem rates as charged were excessive; and that substantial justice between the parties will be served by reducing the verdict and judgment to the extent of \$7,000.

Accordingly, if plaintiffs within 10 days will file a remittitur in the sum of \$7,000, the judgment will be affirmed for \$4,066.36; otherwise it will be reversed and the cause remanded. The costs in this court will be taxed against plaintiffs.

AFFIRMED FOR \$4,066.36 IF REMITTITUR FILED;
OTHERWISE REVERSED AND REMANDED.

Scanlan and Barnes, JJ., concur.

32801

250 L.A. 653³

JOHN HAMMAR and JOHN J. KERN,
Appellants,

v.

SAMUEL G. CHEPMAN,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE GRADY DELIVERED THE OPINION OF THE COURT.

In January, 1926, plaintiffs, as licensed real estate brokers in Chicago, commenced a first class action against defendant to recover the sum of \$4,000, as commissions for procuring the execution of a written contract providing for the exchange of defendant's apartment building property for that of another apartment building property, owned by David O'Shea and wife, but which contract the O'Sheas thereafter refused to consummate. On the first trial in December, 1927, a verdict was returned in plaintiff's favor for \$4,000, but a new trial was granted. On the second trial in March, 1928, the court at the conclusion of plaintiff's evidence instructed the jury to return a verdict in defendant's favor, which they did. It is from the judgment entered upon that verdict against plaintiffs that the present appeal is prosecuted.

On the trial Hammar and Kern testified and certain documentary evidence was introduced by them. It appears that in November, 1925, and prior thereto, Kern was a licensed real estate broker in Chicago, doing business as John J. Kern & Co. Hammar, also a licensed broker, worked as a salesman for Kern. The arrangement between them was that Hammar was to get one-half of the

commissions on all real estate deals consummated through his efforts. Prior to the year 1925, the O'Sheas had listed with Kern & Co., for sale or exchange, their apartment building, located at 1449-51 Winnemac avenue, Chicago, and early in November, 1925, at Hammar's request, defendant listed with Kern & Co., for sale or exchange, his larger apartment building, located at 1436-42 Thorndale avenue, Chicago, and Hammar immediately commenced negotiations with the O'Sheas and with defendant to bring about an exchange of the two properties. At this time both properties had incumbrances upon them and the O'Sheas also were the owners of another flat building, located at 4231-35 Kenmore avenue, Chicago, upon which there was a first mortgage. As the result of Hammar's efforts a contract, drafted by him, was signed by the O'Sheas and by defendant and wife on November 14, 1925. It provided in substance that the O'Sheas, at the named consideration of \$55,000, agreed to convey to defendant their Winnemac avenue property and building by warranty deed, subject to existing leases, certain taxes and assessments, and to a first mortgage of \$11,000, at 6% interest and maturing in 1927; that defendant and wife, at the named consideration of \$157,000, agreed to convey to the O'Sheas the Thorndale avenue property and building by warranty deed, subject to existing leases and certain taxes and assessments, and also subject to a first mortgage of \$100,000, at 7% interest, maturing on December 1, 1932, and also subject to a second mortgage of \$14,000, at 6% interest, maturing in November, 1927; that the O'Sheas further agreed to pay to defendant, at the date of the delivery of the deeds mentioned and as part purchase money, "the sum of \$4,000 in the form of a second mortgage note," due on or before one year at 6% interest, - the pay-

concluded on all past and future transactions between the
parties. Taylor is the party in the year 1911, the parties and listed with
them a Co., for sale of securities, their respective interests, provided
as 1911-12 financial year, Chicago, and early in December, 1911.
at Harmon's request, before at listed with him a Co., for sale
of securities, the larger apartment building, located at 1911-12
Theodore street, Chicago, and Harmon immediately assumed
negotiations with the parties and with intention to enter upon an
exchange of the two properties. At this time both properties had
interests upon them and the parties were the owners of
another flat building, located at 1911-12 Harmon street, Chicago.
upon which there was a first mortgage. In the month of January
efforts a building, located on the site, was signed by the parties and
by agreement and with an intention to, 1911. It located in the
vicinity of the building, at the same location of 1911-12.
agreed to convey to Harmon the building and the premises and
building by mortgage and subject to existing liens, certain items
and premises, and to a first mortgage of \$100,000. At the same time
and setting in 1911 the agreement and with, at the same time
sum of \$100,000 agreed to convey to the parties the building
certain property and building of certain items, subject to existing
liens and certain liens and mortgages, and the subject to a first
mortgage of \$100,000, at the interest, located on December 1, 1911,
and also subject to a second mortgage of \$100,000, at 1911-12 interest,
maturing in November, 1912. From the parties there after to pay
be delivered, at the date of the delivery of the deed, mortgage and
a first mortgage note, "and was at 1911-12 in the form of a second
mortgage note," and on or before the date of its interest - the pay-

ment of the note to be secured by a trust deed on their said Kenmore avenue flat building; and that both parties further agreed that all deeds should be passed and negotiations closed within 5 days after the titles to the properties had been found good, that "brokerage fees or commissions" should be paid to Kern & Co. and Hammar by the respective parties, "as agreed between them and said brokers," and that "this contract" should be held by Kern & Co., for the mutual benefit of the parties.

Hammar testified that, at the time he procured the signatures of defendant and wife to the contract, they also signed at his request another instrument, drafted by him and addressed to Kern & Co., and which Kern & Co. "accepted" as per endorsement thereon, as follows:

"In consideration of services rendered by you in procuring a contract for exchange of our property located at 1436-42 Thornedale ave., we hereby agree to pay you the sum of Four Thousand (\$4,000) Dollars if Mortgage Note, secured by 6 flat at 4231-35 Kenmore ave., Chicago, being full compensation for said services."

Hammar further testified that, when he first showed the draft of the contract to defendant, he discussed with him the subject of commissions for the first time, and told him that they would be \$4,000; that thereupon defendant asked if he and Kern would take for their commission "that \$4,000 note and second mortgage" on the Kenmore avenue building; that he (Hammar) replied that "we will, as there is no cash in the deal;" that they then talked with Kern about the arrangement for payment of commissions and Kern said it was satisfactory to him; that "we agreed to take a \$4,000 second mortgage secured by a six-flat building on Kenmore avenue;" and that "I knew that the O'Heas owned the Kenmore avenue building, that Herman could not make a second mortgage on that building, and that the only way we could possibly get this second mortgage of \$4,000 was for the O'Heas

to give it to Cherman in the exchange, if the deal was consummated." Kern testified that he, too, had knowledge of these facts when he consented to the arrangement. Hammer further testified that early in December, 1925, after the titles to both properties had been examined and found to be good, he notified the O'Sheas that everything was in readiness to close the deal; that their attorney, Mr. Moriarity, informed him that they had decided not to consummate the deal because "the proposition was too big for them;" that he then told defendant (Cherman) that the only thing for him to do "was to start a suit for specific performance of the contract;" that defendant replied that he did not want to do this "because he had to go to Florida and had to sell the building pretty quick;" that in subsequent talks with defendant the latter expressed himself as being willing to close the deal but was not willing to attempt to enforce it; and that defendant "never told him he would not go through with the deal."

Under the undisputed evidence, we are of the opinion that plaintiffs were not entitled to recover any sum of money from defendant for bringing about the signing of the contract, which the O'Sheas thereafter refused to consummate. By the separate instrument, signed by defendant and wife and accepted by plaintiffs at the time the contract for the exchange of the properties was executed, plaintiffs agreed to take in full compensation for their services as brokers the \$4,000 note of the O'Sheas to be secured by a second mortgage on their Kenmore avenue property, and at this time plaintiffs knew that the receipt of such a note and mortgage was dependent upon the contract being consummated. We think that the case of Thompson v. Ryan, 133 Iowa 395, is in point. In that case it appears that a broker,

for bringing about a sale of property of his principal, had agreed to accept for his commissions certain "securities" which the principal was to receive from the other party to the sale, and it was held in substance that the broker was not entitled to a money judgment for commissions against the principal, where the latter was not to blame for the failure of the consummation of the contract, and that the broker was not entitled to his commissions until the sale had actually been effected and said securities delivered to the principal. In the present case plaintiffs admit that defendant was able and willing to consummate the contract, but they say that, upon their request and for their benefit, he refused to file a bill against the O'Sheas for specific performance of the contract, stating that he wanted quickly to sell his building, and they argue that this refusal constitutes an abandonment of the contract on his part. We do not think so. We find nothing in the contract, or in the other agreement that defendant made with plaintiffs as to commissions, requiring him to institute legal proceedings against the O'Sheas to enforce the contract in case they refused to carry it out. The language appearing in the opinion in Tunne v. Colomb, 192 Calif. 740, 747, is pertinent, viz: "In the case at bar the duty of the vendors to carry out the terms of their contract in good faith was at an end upon the default of the vendee. They were under no obligation to sue upon the contract in an attempt to recover the purchase price, although such action if successful would have inured to the benefit of the broker." And we do not think that the decisions in the cases of Wilson v. Mason, 158 Ill. 304, and Fox v. Ryan, 240 Id. 391, relied upon by plaintiffs' counsel, are applicable to the facts as disclosed in the present transcript.

for obtaining such a sale of property if the property had been
 in charge for the same reason as the "exception" which was made
 and it would have been the same party to the sale, and it was held in
 reference that the power was not confined to a power to convey the
 consideration against the principal, though the latter was not to be
 for the failure of the consideration of the contract, and that the power
 was not confined to the consideration which the sale had actually been
 effected and was extended to the consideration in the contract. In the present
 case plaintiff's claim that defendant was not willing to consummate
 the contract, but that he was, upon that subject and the claim
 denied, he refused to give a bill against the defendant the specific
 performance of the contract, stating that he would rather be left his
 property, and that right that that defendant was to consummate
 of the contract in his favor. He is not bound to. He had refused in
 the contract, as in the other agreement that defendant made with claim-
 ants as to consummate, requiring him to consummate being consummation
 against the contract in relation to the contract in some way between the
 party to the contract. The defendant's question in the opinion is Young v. Young,
 100 Cal. 700, 701, 34 P. 2d 1000, 1001. In the case of the other
 of the contract in which the terms of the contract are that claim-
 ants as to consummate the contract in some way between the
 was at the end of the contract of the contract. They were not to
 obligation to one upon the contract as an attempt to convey the property
 effect, although such action is not binding upon the contract in the
 benefit of the contract, and as to that the contract is not
 void of being a contract, and the bill was, and Young v. Young, 100 Cal. 700,
 relied upon by plaintiff's counsel, was applicable to the facts as dis-
 closed in the present case.

Our conclusions are that plaintiffs' evidence did not disclose such a case as entitled them in law to recover, and that the trial court was warranted in instructing the jury in defendant's favor and in entering the judgment appealed from. Accordingly the judgment will be affirmed.

AFFIRMED.

Scanlan and Barnes, JJ., concur.

The Committee has been instructed to submit a report to the President and the Senate on the progress of the work of the Commission on the Organization of the Executive Branch of the Government. The Commission has been working for some time on this subject and has made considerable progress. It has held many public hearings and has received many suggestions from the public. It has also conducted extensive research into the various problems connected with the organization of the Executive Branch. The Commission believes that it is now in a position to submit a report to the President and the Senate on the progress of its work.

RECOMMENDATIONS

Executive Order No. 11,659, July 19, 1950.

The Commission believes that the following recommendations should be adopted by the President and the Senate:

1. That the Department of the Interior be reorganized so that the Bureau of Land Management, the Bureau of Reclamation, and the Geological Survey be placed under the same Secretary of the Interior.
2. That the Department of the Interior be reorganized so that the Bureau of Indian Affairs, the Bureau of Prisons, and the Federal Bureau of Investigation be placed under the same Secretary of the Interior.
3. That the Department of the Interior be reorganized so that the Bureau of Mines, the Bureau of Fish and Wildlife, and the Bureau of Conservation be placed under the same Secretary of the Interior.
4. That the Department of the Interior be reorganized so that the Bureau of Indian Affairs, the Bureau of Prisons, and the Federal Bureau of Investigation be placed under the same Secretary of the Interior.
5. That the Department of the Interior be reorganized so that the Bureau of Mines, the Bureau of Fish and Wildlife, and the Bureau of Conservation be placed under the same Secretary of the Interior.
6. That the Department of the Interior be reorganized so that the Bureau of Indian Affairs, the Bureau of Prisons, and the Federal Bureau of Investigation be placed under the same Secretary of the Interior.
7. That the Department of the Interior be reorganized so that the Bureau of Mines, the Bureau of Fish and Wildlife, and the Bureau of Conservation be placed under the same Secretary of the Interior.
8. That the Department of the Interior be reorganized so that the Bureau of Indian Affairs, the Bureau of Prisons, and the Federal Bureau of Investigation be placed under the same Secretary of the Interior.
9. That the Department of the Interior be reorganized so that the Bureau of Mines, the Bureau of Fish and Wildlife, and the Bureau of Conservation be placed under the same Secretary of the Interior.
10. That the Department of the Interior be reorganized so that the Bureau of Indian Affairs, the Bureau of Prisons, and the Federal Bureau of Investigation be placed under the same Secretary of the Interior.

32810

BARRINGTON PACKING & PROVISION CO.,
a corporation,

Appellee,

v.

JOURDAN PACKING COMPANY,
a corporation,

Appellant.

250 I.A. 658⁴

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action of assumpsit to recover the sum of \$1234.30, for meats, lard, etc., sold and delivered to defendant between January 25th and February 1st, 1926, defendant in its pleadings admitted the indebtedness but claimed a set-off in excess thereof. On the trial, at the conclusion of defendant's evidence in support of its set-off, the court instructed the jury to find the issues for plaintiff for the full amount of its claim. Such verdict was returned, and on January 13, 1928, judgment was entered against defendant for \$1234.30, and this appeal followed.

The substance of defendant's set-off, as disclosed from its pleadings and affidavit, was that prior to January 15, 1926, the parties had had other business dealings together, wherein plaintiff had agreed to sell and deliver to defendant other meats, lard, etc., at certain agreed prices; that in accordance with these agreements, made respectively on November 30th and December 5th, 1925, and on seven other days between January 2nd and 14th, 1926, plaintiff delivered only portions of the merchandise contracted to be delivered and failed and refused, without any just cause, to deliver the balance; that as a result defendant, after giving notice to plaintiff, was obliged to and did go into the open market on

2501-1028

STATE OF NEW YORK
COUNTY OF NEW YORK

IN SENATE
JANUARY 11, 1911
REPORT
OF THE
COMMISSIONERS OF THE LAND OFFICE
IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE
JANUARY 11, 1911

ALBANY: J.B. LEECH, STATE PRINTER, 1911.

IN SENATE
JANUARY 11, 1911
REPORT
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PASSED BY THE SENATE
JANUARY 11, 1911

ALBANY: J.B. LEECH, STATE PRINTER, 1911.

February 19, 1926, and purchase such undelivered portions at the then market prices, which were greatly in excess of the original contract prices; that this excess, as to said undelivered portions, amounted to the sum of \$1587.58; that on said date there also was due to defendant the further sum of \$176, for merchandise (certain empty lard tubs) sold and delivered by it to plaintiff; that the aggregate of these two sums is \$1763.58, which is in excess of plaintiff's claim; and that plaintiff is indebted to defendant for the difference, etc.

At the opening of the trial it was agreed, inasmuch as plaintiff's claim was admitted, that defendant should first introduce evidence in support of its claimed set-off. Defendant called three witnesses, George Lageschulte, general manager of plaintiff, Charles F. Krusbe, the broker through whom the sales of all the merchandise were negotiated, and Louis Jourdan, manager of defendant, and all were examined and cross-examined at considerable length. Defendant also introduced certain written evidence, consisting of confirmations signed by Krusbe of various sales of merchandise, made by plaintiff to defendant through Krusbe's efforts, and letters and other writings.

After reviewing the evidence we are of the opinion that the action of the trial court, in directing a verdict in favor of plaintiff for the amount of its admitted claim, was fully justified. Defendant failed to prove its claim of set-off as to either of the two items. As to the first (\$1587.58 for damages for plaintiff's failure to deliver all of the merchandise as ordered) it sufficiently appears that defendant was guilty of the first breach of contract in that it did not, in several instances, make payments for the merchandise within the times specified in the contracts, and that this was one of the causes for plaintiff withholding some of the deliveries.

Furthermore, there was no evidence that on February 19, 1926, or at any time, defendant actually made any purchases in the open market, or at any prices, for the specific portions of any of the merchandise, which it was claimed were not delivered. and there was no competent evidence as to what were the market prices on February 19, 1926, of the undelivered merchandise. In other words, defendant failed to prove any damages because of plaintiff's claimed breaches of contract. as to the second item of the claimed set-off (\$176 for certain empty tubs claimed to have been sold to plaintiff), there was no evidence that the tubs were actually delivered to plaintiff. Krushe testified that in December, 1925, he got an order over the telephone for certain tubs from Mr. England (then superintendent of plaintiff); that he "believes" they were delivered; and that "it may have been three days or a week after the transferring of the order, - whenever his truck was in Chicago to pick them up."

The judgment appealed from should be affirmed and it is so ordered.

AFFIRMED.

Seanlan and Barnes, JJ., concur.

32822

250 I.A. 654

FRANK J. ALLEN,
Appellant,

v.

MOSSER, WILLAMAN & CO.,
INC., a corporation,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

On March 30, 1928, defendant's general demurrer to plaintiff's declaration in an action of assumpsit was sustained, and, plaintiff electing to stand by his declaration, judgment for costs was entered against him, and he appealed. The action was commenced on April 30, 1927. The declaration consisted of six counts, each of which being based upon the following contract (set out in haec verba in each):

"July 21, 1926

Mr. Frank J. Allen,
231 South La Salle Street,
Chicago.
Dear Sir:

In connection with the financing of the building and fee at 29 South La Salle Street, in the City of Chicago, commonly known as the National Life Building: We are purchasing \$3,500,000 Land Trust Certificates which will represent the beneficial interest in and to the land under the building hereinabove mentioned, and we hereby retain you to assist us and to use your best efforts in the syndication and sale of said certificates and also in giving your services in our behalf in the preparation of all proceedings in connection with the set-up and issuance of said certificates, granting you exclusive authority under our direction to proceed.

For your services we do hereby promise to pay to you \$35,000 - said sum to be paid to you upon the completion of syndication and delivery of certificates or interims.

You may indicate your acceptance of this proposal by writing your name in the lower left-hand corner hereof, and by doing so, this letter will constitute and evidence a binding contract between us.

Yours very truly,
Mosses, Willaman & Co., Inc.
By Edson E. Willaman,
Vice President.

Accepted:
Frank J. Allen."

In the first count, after stating the making of the contract on July 21, 1926, plaintiff avers that he then and there entered upon and undertook the performance of the same, and "rendered services thereunder under the direction of defendant as therein provided, and did and performed all things required of him by said contract;" that, as a result of his services and efforts, he "arranged for the syndication and sale of said certificates as required in said contract;" that "nevertheless, the defendant refused to proceed with the completion of said syndication or with the delivery of said certificates or interims," and refused to pay to plaintiff for his services the said sum of \$35,000, which is due to him under the contract; and that, although on January 3, 1927, and thereafter, plaintiff requested of defendant the payment of said sum, the latter still refuses to make such payment.

The other counts are similar. In the second it is averred that, as a result of plaintiff's services and efforts "he interested certain bankers, brokers, capitalists and other parties in the syndication and sale of said certificates, and obtained and placed defendant in touch with persons who were ready, able and willing to carry out the syndication and sale of said certificates;" but that defendant refused to proceed with said syndication, and on January 3, 1927, notified plaintiff that said syndication "had been dropped" and that defendant would proceed no further therein, etc. In the third, fourth and sixth counts it is averred that on January 3, 1927, defendant notified plaintiff that said syndication and sale of the certificates "had been called off," whereby plaintiff was prevented from performing and completing the contract on his part. In the fifth count it is averred that on January 3, 1927, defendant gave such a notice to plaintiff "without any reasonable cause or occasion therefor."

in the first round, after stating his name at the bar-
 count on July 11, 1918, plaintiff was found to have been
 notified upon and understood the provisions of the same, and
 "remained inactive throughout until the election of January 14
 1919, and his own position was being treated by him
 by said committee, that, as a result of his inaction and attitude,
 he "accepted" the position and was not entitled to be
 regarded in any manner, that "consequently, the defendant was
 bound to proceed with the completion of said position as well
 the delivery of said certificate is required," and refused to pay
 to plaintiff for the services rendered him in 1918, 1919, 1920, 1921
 to him under the contract and that, although on January 11, 1921,
 and thereafter, plaintiff received it following the payment of said
 sum, the latter still refused to make such payment.
 The above facts are stated. On the record it is shown
 that, as a result of plaintiff's position and attitude "he remained
 certain inactive, passive, acquiescent and other parties in the
 position and was not entitled to be treated and placed
 defendant in such position was wrong, and that he
 carry out the position and was not entitled to be
 defendant refused to proceed with said position, and on January 14,
 1919, plaintiff stated that his position "had been accepted."
 and that defendant would proceed to receive the same, in the
 fact, that and that he was not to be treated as a party to the
 defendant notified plaintiff that said position was not of the
 position "had been accepted," thereby plaintiff was bound
 from proceeding and completing the contract on his part. In the
 this case it is shown that on January 11, 1921, defendant gave
 such a notice to plaintiff "without any reasonable cause or reason
 therefor."

We do not think that the court erred in sustaining defendant's demurrer to plaintiff's declaration and each count thereof. By the terms of the contract plaintiff was employed to assist defendant, under its direction, in the syndication and sale of the certificates mentioned and in the preparation of all proceedings in connection with the "set up and issuance" of them, but he was only to receive the stipulated compensation (\$35,000) "upon the completion of syndication and delivery of certificates or interims." It is not alleged that the syndication was completed, or that there was a delivery of any of the certificates or interims. While it is alleged in each count that defendant refused to proceed with the syndication and sale, no facts are stated showing that this refusal was made arbitrarily. Nor are any facts stated showing that, when defendant notified plaintiff that the proposed syndication and sale had been "dropped" or "called off," the same was feasible of consummation, or that it could be consummated if more time be expended on the work. It appears that defendant's alleged notice to plaintiff was given nearly six months after the making of the contract. Nor is it anywhere alleged that plaintiff had found a purchaser or purchasers for the certificates, or any of them, at prices and terms acceptable to defendant. Under the contract the sum sued for (\$35,000) was to be paid only "upon the completion of syndication and delivery of certificates or interims." Such completion and delivery not being alleged, nor any facts showing that such completion or delivery were prevented by defendant's acts, we do not think that any cause of action was stated.

The judgment is affirmed.

AFFIRMED.

Seanlan and Barnes, JJ., concur.

32847

250 I.A. 654²

O. C. HUMER,
Appellee,

v.

FRANK HERST,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT

On September 13, 1927, plaintiff commenced an action in replevin against defendant to recover the possession of a certain Stutz automobile, stating in his affidavit that he was the owner of it, and that on September 1, 1927, defendant wrongfully took it and wrongfully detains it from him. The sheriff took it under the writ and delivered it to him. From the voluminous pleadings it appears that defendant claimed title by virtue of a chattel mortgage, signed by William J. Johnson on March 23, 1927, wherein he conveyed the automobile to the Stutz Chicago Factory Branch, a corporation, as mortgagee (hereinafter referred to as the Stutz Co.), and which mortgage was assigned by it to defendant. It further appears that plaintiff claimed to have purchased the automobile in regular course of trade on June 20, 1927, from the Trio Motor Sales Company, a corporation (hereinafter referred to as the Trio Co.), which was the duly authorized sales agent of the Stutz Co. in the sale of Stutz cars. Upon the trial, before a jury in January, 1928, plaintiff took the position that the mortgage was not valid as against him, a purchaser of the automobile in good faith and for value, for two reasons, (1) that when the mortgage was signed there was a contemporaneous oral agreement made, giving permission to the

Trio Co. to sell the automobile, and (2) that the mortgage was not in fact acknowledged by the mortgagor at any time. Each party introduced a mass of evidence, oral and documentary. The jury returned a verdict finding the issues for plaintiff and that the title to, and right to the possession of, the property replevied was in him. On March 31, 1928, judgment was entered against defendant upon the verdict and he appealed.

In March, 1927, and prior thereto, the Stutz Co. was the Chicago distributor of Stutz cars. Its place of business was at 25th and South Michigan avenue. F. L. Cerf was its president, B. G. Peterson its treasurer, and Robert J. O'Donnell, its sales manager. Frank Herst, the defendant, was an "automobile banker," doing business under the name of the "Equitable Finance Co." at No. 332 South Michigan avenue. He frequently had financial dealings with the Stutz Co. Perry S. Herst, his son, was associated with him in the business. For a considerable period prior to March, 1927, the Trio Co. was engaged in the automobile business at 4645 N. Washington Boulevard and sold Jordan cars exclusively. Leo R. La Porte was its president and said William J. Johnson its secretary. They together owned all of its stock except one share. The Stutz Co. had been urging the Trio Co. also to handle and sell Stutz cars. On March 23, 1927, La Porte and Johnson called at the offices of the Stutz Co., and met Cerf, Peterson and O'Donnell, with the result that La Porte, acting for the Trio Co., signed a Stutz agency agreement and three new cars were picked out. It was agreed that two of them should be delivered to the Trio Co., on consignment, for sale by it, and that as to the other, which was to be used for a time by the Trio Co. as a demonstrator, a note was to be given, secured by chattel mortgage, payable in monthly installments and maturing

in one year. Discussion followed as to who should sign the note and mortgage and it was agreed finally that Johnsen should do so, although it was understood that the Trio Co. would pay the installments on the note as they matured. Thereupon Johnsen signed the papers as presented to him. The note, payable to his own order, was signed and endorsed by him, and also endorsed by the Trio Co., by La Porte, president. The mortgage, as presented, was in printed form, headed "Equitable Finance Co.," with some of the forms, but not all, filled out in typewriting. It consisted of one sheet of paper and some of the forms were on the back thereof. Johnsen signed his name once on the face of the paper and twice on the back. The forms on the back were not then filled out. Within a day or two, the three cars were in the possession of the Trio Co., and thereafter, on March 23, 1927, the mortgage was recorded in the office of the recorder of Cook county.

Upon the trial the note and mortgage, both dated March 23, 1927, were introduced in evidence. By the note Johnsen promised to pay "at the office of Frank Herst, Chicago," the sum of \$2370.60, in twelve equal monthly installments of \$197.55, (the last one being due on March 23, 1928), and it was provided that, upon default in payment of any one installment when due, the entire amount remaining unpaid should, at the option of the holder of the note and without notice, become immediately due and payable. There are endorsements on the note showing that the first three installments, due in April, May and June, 1927, were paid.

The mortgage contains the usual provisions. It states that Johnsen, mortgagor, in consideration of \$2370.60, to him paid by the Stutz Co., mortgagee, sells, conveys and mortgages the automobile in question (describing it), and that, if he shall pay the principal and interest of the note of \$2370.60 (describing it)

in one part. Information followed as to who should sign the note and message and it was agreed that the note should be signed by the President and the message by the Vice President. It was understood that the note would be sent immediately on the note as they arrived. The message would be sent the next day. The note, however, was to be sent on the day it was received by the President. The message, on the other hand, was to be sent on the day it was received by the Vice President. The note, dated "Honorable William H. Taft, President of the United States, Washington, D.C.", was sent at the time, but not all, filled out in typewriting. It consisted of two sheets of paper and some of the letters were on the back sheet. The President signed his name on the top of the page and then on the back. The letter on the back was not filled out. Within a day or two, the letter was in the possession of the Vice President. The letter, on March 11, 1917, the message was received in the office of the President at that time.

When the letter was sent and message, both dated March 11, 1917, were introduced in evidence. It was also introduced in evidence to pay at the office of the President. The note of March 11, 1917, in five equal monthly installments of \$100,000. The last was paid on March 11, 1917, and it was provided that, upon receipt of the payment of any one installment when due, the whole amount remaining unpaid should, at the option of the holder of the note and without notice, become immediately due and payable. There are statements on the note showing that the first three installments, \$300,000, were paid May and June, 1917, were paid.

The message contains the same provisions. It states that the holder, however, is authorized at \$100,000, to his option by the date 1917, message, which message was sent on the same date as the message (March 11, 1917), it is well known that the holder and interest of the note of March 11, 1917, (March 11, 1917).

according to its terms, the mortgage shall become void, etc.

Below Johnson's signature is the certificate of James A. Kearns, clerk of the Municipal court, with the seal of the court affixed, that the mortgage "was acknowledged before me by the within named Wm. J. Johnson, by Perry S. Herst, his attorney-in-fact, for all the purposes named in said instrument and entered by me this March 26, 1927." On the back of the mortgage, over one of Johnson's signatures, is the filled out form, dated March 23, 1927, to the effect that he appoints Perry S. Herst, as his attorney-in-fact, to appear before said clerk of the municipal court and in his behalf to "acknowledge the execution of the within instrument," etc. Underneath is the filled out form of a certificate of a notary public "Rae E. Gerstein," under her signature and with her seal affixed, - dated March 23, 1927, to the effect that on that day Johnson appeared before her in person and "acknowledged that he signed, sealed and delivered the foregoing power of attorney as his free and voluntary act," etc. Over another of Johnson's signatures, is the unfilled out form of a mortgagor's affidavit to the effect that he is the lawful owner of the automobile described in the mortgage, and that it is free from liens, etc. Alongside is the unfilled out form of a notary's jurat, viz "Subscribed and sworn to before me this -----day of----- A. D. 19__." The signature of said notary appears, however, and her notarial seal is affixed. Still further down on the back of the paper, and under the heading "Assignment. Do not Record," is the following:

"For value received, the mortgagee named in the within mortgage does hereby sell, assign and transfer to Frank Herst, Chicago, all of said mortgagee's right, title and interest in and to said chattel mortgage, and the notes secured thereby, and authorizes said Frank Herst to collect and discharge the same. * *"

In witness whereof, said undersigned has hereunto subscribed his, its or their name this 23rd day of March, 1927.

(signed) Stutz Chicago Factory Branch (seal)
by B. G. Peterson. (seal)
Treas."

It appears from defendant's testimony that on March 24, 1927, the day after the note and mortgage were signed, he purchased them from the Stutz Co. for the sum of \$2091.05, by a check of that date of the "Equitable Finance Co.," signed by his son, Perry S. Herst (the same individual who acknowledged the mortgage on March 26th, as attorney in fact for Johnson, before the clerk of the Municipal court); that on March 24th the Stutz Co. delivered the note and mortgage to defendant (it having prior thereto endorsed in writing upon the mortgage its written assignment thereof to defendant, as above shown); that the first three installments on the note, each for \$197.55, due in April, May and June, 1927, were paid by checks of the Trio Co., payable to the order of the "Equitable Finance Co.;" that he received a check for \$197.55 from the Trio Co. for the July installment, but that the check was returned by the bank "not sufficient funds;" and that he then declared the balance of the note, about \$1700, to be immediately due, and directed his attorney to endeavor to take possession for him of the automobile by virtue of the mortgage. In answer to two questions, objected to by plaintiff's attorney on the ground of immateriality, he further testified that, from the time he purchased the note and mortgage and up to the month of July, 1927, he did not have any knowledge that the automobile described in the mortgage ever was on the show room floor of the place of business of the Trio Co. and exposed to the public for sale, and that he never consented or acquiesced in said automobile being so exposed for sale.

The substance of the uncontradicted testimony of plaintiff, a practicing physician with office at No. 6 South Kedzie avenue on the west side of Chicago, is as follows: Early in the year 1925 he purchased of the Trio Co. a Jordan automobile for his personal use and thereafter drove it until June 20, 1927; that in April and May, 1927, on two occasions, while upon the premises of the Trio Co. having certain repairs or adjustments made on his car, he talked about purchasing another car and turning in his Jordan car in part payment. In June, 1927, he noticed that a Stutz car (the one afterwards replevied) was being exhibited for sale by the Trio Co. in its show room and he commenced negotiations with La Porte and Johnson for its purchase, with the result that he purchased it from the Trio Co. for the sum of \$3200 on June 20, 1927. He paid \$1400 in cash, turned in his Jordan car in part payment at the agreed price of \$1350, and gave two short-day notes for the balance, aggregating \$450, and which he paid at maturity. Thereafter he drove the car continuously until September 1, 1927, on which day he left it parked near his office, and later was advised at his office by an attorney that it had been seized and taken away by the Equitable Finance Co., by virtue of a chattel mortgage. He did not see the car again until it was replevied by the sheriff and delivered to him. He further testified that at the time he purchased it he knew that it was not a new car, as its meter showed it had been run about 2300 miles; that he did not make any examination of the records in the recorder's office to see if there was a mortgage upon it; and that at the time of the purchase he was informed by officers of the Trio Co. that that company was an agent for the sale of Stutz cars and he saw on the front window of its premises the sign "Stutz Agency." There was evidence, also, that just prior to September 1, 1927, by virtue of bankruptcy proceedings commenced against the

Trio Co., its business was closed and its property and assets were sold.

On the issue of fact as to whether, at the meeting had in the office of the Stutz Co., on March 23, 1927, between the officers of that company, and Johnson and La Porte representing the Trio Co., and when Johnson signed the mortgage on the car, a contemporaneous verbal agreement was made, giving permission to the Trio Co. to sell the car notwithstanding the mortgage, the evidence was conflicting. Johnson testified: "Mr. O'Donnell said for us to sell the car, the demonstrator, within sixty days; by the demonstrator I mean the car covered by the mortgage; it was a brand new car when we got it; * * it was the same car that was subsequently sold to Dr. Huber; * * Mr. O'Donnell further said that by using it for demonstrating purposes it would depreciate that much more; * * Mr. O'Donnell further said that if the car was sold the money received on it should be paid in and then we could purchase another car on the same plan and give a mortgage for that; * * Mr. La Porte and Mr. Peterson were present at that conversation." La Porte's testimony corroborated that of Johnson as to the making of such a verbal agreement at that time. The substance of O'Donnell's and Peterson's testimony was that no such verbal agreement was made. On the issue as to whether, when Johnson signed the mortgage, he in fact then or thereafter actually acknowledged the power of attorney before the notary public, Rae E. Gerstein, for Perry S. Herst as his attorney in fact to appear before the clerk of the municipal court and acknowledge it in his stead, the evidence also was conflicting. Johnson testified: "The document bears my signature on the front side of it, and in two places on the reverse side; when I signed my name in these two places there was no typewriting on the reverse side; there was nothing there other than the printed matter; * * La Porte, O'Donnell and Peterson were present; * *

no woman was present; * * no person named Rae E. Gerstein was present." La Porte's testimony was to the same effect. And the counter testimony of O'Donnell and Petersen that Johnson did acknowledge the instrument before said Rae E. Gerstein, who was Gerf's secretary, was not convincing or satisfactory. She was not called as a witness, although present in court during the trial.

The main contention of counsel for defendant is that the verdict on these two issues is manifestly against the weight of the evidence. We cannot agree with the contention.

And we do not think that the verdict is contrary to law. While it is well settled in this State that a chattel mortgage, "executed, acknowledged and filed for record as the statute requires, is notice to all the world" (Johnson v. Wilcox Lumber Co., 295 Ill. 294, 299; Khrlich v. Chapple, 311 id. 467, 469); still, it is equally well settled that, "if not executed, acknowledged and recorded as provided by statute, a chattel mortgage is invalid as to those not parties or privies to it." (Kimball Co. v. Polakow, 268 Ill. 344, 348, and cases cited.) The opinion in this Polakow case was rendered prior to the passage of the amendments of 1915 and 1925 to section 2 of the Act "in relation to mortgages of real and personal property," and was predicated on the fact that there was then no provision in the statute authorizing the acknowledgment of a chattel mortgage to be made under power of attorney. In the case of Cash Register Co. v. Riley Advertising System, 329 Ill. 403, decided since the passage of said amendments, it is said (p. 407): "Unless such chattel mortgage is executed and acknowledged in strict compliance with the statute it is void as to third persons even though they may have notice of the existence of it." By the present section 2 of the Act, which was in force when the mortgage in question was signed in March, 1927,

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(Cahill's Stat. 1927, chap. 93, pp. 1705-6), it is provided that "such acknowledgment may be made either by the mortgagor or a person duly authorized by said mortgagor to act as his attorney in fact." Then follows a form of the instrument authorizing such acknowledgment to be made by an attorney in fact, and the form of the certificate of the officer to the acknowledgment by the mortgagor of such instrument; and it is further provided that "said instrument, authorizing the acknowledgment by attorney in fact as herein specified, shall be signed by the mortgagor and shall be acknowledged before any officer authorized to take acknowledgments of deeds." In McBowell v. Stewart, 83 Ill. 538, a chattel mortgage was introduced in evidence which purported to show on its face that it had been acknowledged by the mortgagor before a certain justice of the peace, but there was evidence showing that such was not the fact. The Court, in affirming the judgment, said (p. 539): "It is very clear that the certificate of acknowledgment is false, and that the statute was not, in fact, complied with in that regard. Whether notice was conveyed to parties as well by the instrument, as thus executed, as it would have been had the law been faithfully observed, is not for us to inquire. As between the parties, it was valid without any acknowledgment; but, without the acknowledgment it has no effect upon the rights of third parties acting in good faith." In the present case, under the conflicting testimony and the circumstances in evidence surrounding the transaction, we think that it was for the jury to say whether the mortgage was in fact acknowledged by Johnson.

And we think it was also for the jury to say, under all the facts and circumstances in evidence, whether, at the time Johnson signed the mortgage and before the State Co. assigned it to defendant

there was a verbal agreement entered into between the Stutz Co. and Johnson or the Trio Co., to the effect that, notwithstanding the mortgage, the Trio Co. might sell the car in question. Such an agreement, if then made, rendered the mortgage void even as against defendant, the subsequent assignee of the mortgage from the Stutz Co., and also as to plaintiff, who purchased the car of the Trio Co. in good faith and for value. (Anderson v. South Chicago Brewing Co., 173 Ill. 213; Pratt v. Maynard, 116 Mass. 388; Huschle v. Morris, 131 Ill. 587; Dunning v. Head, 96 Ill. 376.) In the Anderson case it is decided in substance that the purchaser of mortgaged chattels, on bringing replevin against the assignee of the mortgage, who took possession of the property claiming a breach by reason of the sale, may show that the original mortgagee, before he assigned the mortgage, gave his verbal consent to the sale. The Court, in that case, said (p. 216): "It is well settled the admissions of the assignor and holder of a non-assignable instrument, made before the assignment and against the interest of the then holder and owner of the chose in action, are admissible in evidence against the assignee." And the Court again said (p. 218): "And we think there is substantial concurrence of judicial decision upon the proposition that an oral assent of a mortgagee to the sale of the property is always available to the purchaser under such statutes." In the Pratt case, it is decided that, if the mortgagee of a chattel orally authorizes the mortgagor to sell it, a sale by the latter passes the title to a purchaser in good faith. In the Huschle case it is decided that, if any arrangement is made, express or implied, by which the mortgagor is allowed to continue the sale of the goods for his benefit, the mortgage will be invalid as against an attachment or execution creditor. In the Dunning case it is decided that, if the mortgagee soon after its execution gives written permission to

the mortgagor to sell the goods in the usual course of his business, but to hold the proceeds as agent for him, and such sales are made, it will render the mortgage void as to bona fide creditors and purchasers.

And we do not think that the trial court committed reversible error in rulings as to the admissibility of certain evidence, as urged, or in the giving of another instruction offered by plaintiff, complained of. Nor do we think that the argument of plaintiff's attorney to the jury was so prejudicial to defendant as warrants a reversal of the judgment.

Our conclusion is that the judgment of the circuit court should be affirmed and it is so ordered.

AFFIRMED.

Scanlan and Barnes, JJ., concur.

It will require the assistance of the local authorities and the police to ensure that the necessary measures are taken to protect the public and the environment.

and we do not think that the final report submitted

THE UNIVERSITY OF CHICAGO

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32886

250 I.A. 854

DAVID SAUL KLAFTER,
Appellant,

v.

ABE S. FRIEDMAN and
ALEX FRIEDMAN, doing business
as Friedman Brothers,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE GRILLEY DELIVERED THE OPINION OF THE COURT.

On June 15, 1927, plaintiff caused a judgment by confession to be entered upon a lease against defendants. The judgment was for \$7828, - \$7600 for rent for 19 months from September, 1925, to March, 1927, inclusive, at \$400 per month, and \$228 for attorney's fees. On November 7, 1927, the court opened the judgment and defendants were allowed to file an affidavit of merits, the judgment to stand as security. Subsequently plaintiff filed a lengthy reply claiming a former adjudication, or estoppel by verdict, as to the matters of defense set up in the affidavit. A trial was had before a jury, resulting in a verdict finding the issues against plaintiff, and on March 9, 1928, following the verdict, the court adjudged that said confessed judgment of \$7828 be vacated, that plaintiff take nothing by the suit and that defendants recover their costs. This appeal followed.

The lease was signed by the parties on May 17, 1925. By it plaintiff, as lessor, demised certain land, situated at the southeast corner of Lakeside place and Clarendon avenue, Chicago, to defendants, as lessees, to be used for an automobile service station, for the period of 10 years, from June 1, 1925, to May 31, 1935, at a monthly rental of \$400, payable on the first day of

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THE UNIVERSITY OF CHICAGO
CHICAGO, ILLINOIS

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THE above was signed by the parties on May 17, 1922.

each month in advance. The lessees (defendants) agreed at their own expense to erect and maintain on the land all the buildings, pumps, tanks, and equipment necessary or convenient for the conducting of the business, and to obtain the necessary permits for the erection of all improvements and for the operation of the service station. It was further agreed that "should said lessees (defendants) be unable to secure any necessary license, permit or consent for the construction of such station for the conduct of the business, as aforesaid, then this lease to be void, and all payments made hereunder shall be at once returned to the lessees upon demand."

In defendants' affidavit of merits they set forth three defenses to the judgment (1) that the lease was entered into without any good or valuable consideration; (2) that their signing of it was fraudulently obtained by plaintiff; and (3) that under one of its provisions the lease became void. Plaintiff in his reply alleged certain facts concerning two prior suits between the parties, which were consolidated and tried together in the Municipal court of Chicago, and in which a certain judgment was entered, and contended that, because of these facts, said judgment and the record of said suits, defendants' said defenses in the present action were of no avail to them because of the doctrine of former adjudication or estoppel by verdict. On the trial defendants introduced evidence tending to support said defenses. Plaintiff did not present any opposing evidence on the merits, but, upon introducing the pleadings, record and bill of exceptions of said former suits, relied solely upon them as sustaining his contention of former adjudication, etc.

It appears from the evidence introduced by the Friedmans in the present action that the lease in question was negotiated

by one Weinberger of Michael Flicht & Co., brokers for the lessor (Klafter); that a few days prior to its execution the Friedmans paid to Weinberger the sum of \$800 for three months' rent, viz, the months of June, July and August, 1925, and obtained from said brokers a receipt therefor; that Weinberger represented to them that if they signed the lease they would not have to get any permits or frontage consents, because Klafter had already obtained them and that all they would have to do would be to sign the lease, pay to Klafter the cost of the permit already obtained by him, and proceed with the erection of the buildings, etc.; that relying upon these representations, as well as similar ones made by Klafter himself, they made the payment of \$800 to said brokers and signed the lease, and also paid Klafter \$211.25 for a certain permit which he already had, and also paid the additional sum of \$22 for an extension or renewal thereof; that upon investigation the Friedmans ascertained that said representations were not true; that the permit, for which \$211.25 was paid to Klafter, did not cover the entire premises but only a portion thereof; that after conferences with the proper officials it was ascertained that the Friedmans were unable to obtain the necessary permits for the erection of the buildings, etc., without obtaining additional frontage consents; that thereupon the Friedmans decided, because of the situation and the provisions of the lease and said misrepresentations, not to take possession of the premises; that they never did so, but leased other premises in another locality which they have since occupied in their said business of running an automobile service station; that on August 20, 1925, they brought suit against Klafter in the municipal court of Chicago, to recover back from him the sum of \$800 (so paid said brokers), the \$211.25

(so paid to Klafter) and the \$22 (so paid for the extension or renewal of said permit); and that on August 31, 1925 (two days thereafter) Klafter caused a judgment by confession to be entered in the same court against the Friedmans on the lease for the sum of \$450 - \$400 for rent claimed to be due for the month of August, 1925, and \$80 attorney's fees. This judgment by confession subsequently was opened and both of the suits were put at issue by the filing of affidavits of merits. Subsequently these suits were consolidated and were tried together by the court without a jury, resulting in a finding and judgment in favor of the Friedmans for \$211.25, from which judgment Klafter prayed but did not perfect an appeal.

From the record of the consolidated suits, including the bill of exceptions, introduced in evidence by Klafter in the present suit, it appears that Klafter in his affidavit of merits to the Friedmans' claims set forth the following defenses: (1) That the Friedmans could and did secure the necessary license or permit for the construction of the service station; (2) that they are indebted to the defendant in the sum of \$450, being the amount of a judgment rendered in favor of Klafter against them; (3) that the court is without jurisdiction of the subject matter of the Friedmans' claim; (4) that the Friedmans breached the lease and repeatedly stated that they would not proceed thereunder, and hence they are not entitled to maintain their action; (5) that Klafter denies that he made any misrepresentations, or that he fraudulently obtained any money from the Friedmans, or that he concealed any facts from them; and (6) that he is not indebted to them in any sum whatsoever. It also appears that after all the evidence had been heard in the consolidated suits, the following occurred:

THE COURT: Now, as to this lease, I am going to find that there is nothing due for August. As to the implied warranty, I am going to find for the plaintiffs (the Friedmans). How much is it?

MR. ARND (Attorney for the Friedmans): \$211.25.

THE COURT: Klafter v. Friedmans. You are suing for one month's rent?

MR. SCOLNIK (Attorney for Klafter): Yes.

THE COURT: Finding is for the defendants (the Friedmans). And as to the other finding, it is for the plaintiffs (the Friedmans) for \$211.25. Your motions (addressing Mr. Scolnik) for a new trial and in arrest of judgment are overruled. * * Judgments on the findings. * * *

MR. SCOLNIK: I would like to ask the court for a special finding on that for the reason that your Honor is finding that the rent for August is paid by this receipt?

THE COURT: Yes.

MR. SCOLNIK: It isn't an adjudication that the lease was terminated? * * One of the issues, you see, - we have a lease here that is still in force and effect, as a matter of fact.

THE COURT: That is not an issue here. You are suing for a certain amount of rent. As to whether or not the lease is terminated, that is for another suit.

MR. SCOLNIK: You are deciding that in the other case.

THE COURT: Why?

MR. SCOLNIK: Then you find we are entitled to keep the \$800.

MR. ARND: The legal fact will take care of itself.

MR. SCOLNIK: Your Honor holds that the rent for the month of August, 1935, under that receipt, was paid.

THE COURT: Yes.

MR. SCOLNIK: All right. And, therefore, the finding is for the defendants, Friedman Brothers, on that issue."

As we understand the main contention of counsel for Klafter, relied upon for a reversal of the judgment appealed from, it is in substance that, because the court in said consolidated suits did not allow the Friedmans to recover back said \$800, which they had sued for as well as for other moneys, the lease was in effect adjudicated to be a valid one and not terminated, and that, hence, the judgment entered by confession in favor of Klafter on said lease against the Friedmans, for 19 months rent at \$400 per month, should be allowed to stand. It is our opinion that, under the evidence and the law, there is no merit in the contention. In none of the pleadings in the former suits was the issue presented whether the lease was void, terminated, or in full force and effect. Indeed, it

appears that during the trial of said suits the court stated that such an issue was not therein involved. There was no specific finding made upon such an issue, and there were other distinct issues of fact presented for decision. In People v. Wyand Light Co., 306 Ill. ^{377,} 383, it is said: "It is absolutely necessary in order that a former judgment should operate as an estoppel by verdict that there shall have been a finding of a specific fact in such former judgment or record that is material and controlling in that case and also material and controlling in the pending case. It must also conclusively appear that the matter of fact was so in issue that it was necessarily determined by the court rendering the judgment interposed as a bar by reason of such estoppel. If there is any uncertainty on this point by reason of the fact that more than one distinct issue of fact is presented to the court, the estoppel will not be applied, and for the reason that the court may have decided it upon one of the other issues of fact." (See, also Hoffman v. Hoffman, 330 id. 413, 418; People v. Hart, 332 id. 467, 472.) And we do not think that the court erred in restricting the argument of Klafter's attorney to the jury to the extent it was restricted, or in refusing to enter judgment in Klafter's favor non obstante verdicto, as contended.

Finding no reversible error in the record the judgment of the Municipal Court is affirmed.

AFFIRMED.

Scanlan and Barnes, JJ., concur.

32865

2501A.654⁴

PENNSYLVANIA RAILROAD CO.,
a corporation,

Appellant,

v.

E. L. DENISON,

Appellee.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

MR. PRESIDING JUSTICE GRISLEY DELIVERED THE OPINION OF THE COURT.

In April, 1924, from Jensen, Florida, defendant shipped to himself as consignee at Chicago, Illinois, 25 boxes of grape fruit. Plaintiff was the delivering carrier. When the shipment arrived it notified defendant at his Chicago home of that fact, and that the freight charges were \$23.30. He sent an agent, an expressman, to plaintiff's freight house to get the shipment and pay the charges, and on May 10, 1924, plaintiff, upon such payment, delivered the fruit to the expressman, and the latter conveyed it in his wagon to defendant's home. Subsequently plaintiff notified defendant that the proper charge on the shipment, in accordance with the lawful tariffs, etc., was \$47, and that there was a balance due to it of \$23.70. Defendant did not make payment and plaintiff commenced the present action to recover this balance. Subsequently defendant filed an amended statement of set-off, claiming damages in the sum of \$46.75, because one or two boxes were missing, when delivery of the shipment was made, and others crushed or broken and the fruit therein damaged to the extent of about \$1.75 per box. To this claim of set-off plaintiff filed an affidavit of merits, denying that defendant had suffered any damage, etc.

In February, 1928, there was a trial before the court without a jury, during which defendant conceded that plaintiff was entitled to recover the balance of \$23.70 for freight charges. Therefore, the only issue to be decided was whether the fruit had been damaged during transit, etc. On this issue defendant and the expressman gave testimony tending to sustain defendant's claim, and one McNamara, a clerk in plaintiff's freight house in Chicago, gave contrary testimony, and plaintiff also introduced certain documentary evidence. The court found in favor of defendant for the full amount of his claim of set-off, \$46.75, and, deducting therefrom the \$23.70, for balance of freight charges admitted to be due, assessed defendant's damages at the net sum of \$23.05, and entered judgment against plaintiff on the finding. This appeal followed.

Practically the only contention made by plaintiff's counsel is that, as to the issue raised by defendant's set-off and plaintiff's affidavit of merits, the finding is not sustained by a preponderance of the evidence. We cannot agree with the contention. While the testimony of the opposing witnesses was, in some essential particulars, in direct conflict, we cannot say that the finding is not sufficiently sustained by the evidence. Accordingly, the judgment of the Municipal court will be affirmed.

AFFIRMED.

Scanlan and Barnes, JJ., concur.

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250 I.A. 654⁵

32807

HATTIE FLINT,
Appellant,

v.

CHICAGO CITY RAILWAY
CO., et al.,
Appellees.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

On this appeal plaintiff seeks reversal of a judgment for defendant in a personal injury suit, predicated on the claim that defendant negligently caused a street car on which she was a passenger to be started and moved while she was attempting to alight therefrom, after the car had come to a full stop.

As to whether plaintiff attempted to get off of the car before it came to a stop at the street where she undertook to alight, and whether the car stopped again within a few feet, and whether a witness who testified in her behalf and claimed to have witnessed the accident got off the car at the same place, and as to the number of persons on the rear platform of the car from which she alighted when the car stopped, there was contradictory evidence. Instruction 14, given at the request of defendant, reads as follows:

"The court instructs you that if you believe from the evidence that any witness has wilfully and knowingly sworn falsely to any material element in this case, or that any witness has wilfully and knowingly exaggerated any fact or circumstance material to the issues in the case for the purpose of deceiving, misleading or imposing upon the jury, then they have a right to reject the entire testimony of such witness, except insofar as corroborated by other evidence which you believe, or by facts and circumstances appearing in the case."

A very similar instruction, where there was a sharp conflict in the evidence upon a like issue as to whether a party attempted to leave the train while it was in motion, was given in the case of G. & A. R. R. Co. v. Kelly, 210 Ill. 449. In that case the court held in view of the sharp conflict in the evidence upon such a material issue it was important that the jury should have been correctly instructed as to the rule which should govern them in weighing the evidence of the respective witnesses, and held, after a very full discussion, that the effect of the words, "which they do believe," was to eliminate from the consideration of the jury the evidence of any witness, if any such there was, who had wilfully sworn falsely upon a material matter, unless the jury believed such other ~~material~~ evidence to be true. While there is a slight difference between the two instructions in phraseology it is not such as renders the rule inapplicable to the case at bar. We cannot concur with the contention of appellee that in view of the circumstances of the case and the main issue considered by the jury the instruction was harmless. To say that no witness was shown to have wilfully and knowingly sworn falsely to any material element in the case is begging the question. That was one of the very facts the jury were to determine. It was defendants' theory that plaintiff attempted to alight before the car came to any stop at the street in question and their evidence tended so to prove. It was plaintiff's theory, which her evidence tended to support, that she attempted to alight after it came to a full stop, and that the car was started up and jerked her to the ground while she was attempting to alight, and stopped again within a few feet. In view of this conflict of evidence on that issue

A very similar illustration, where there was a sharp conflict in the evidence upon a like issue as to whether a party attempted to leave the train while it was in motion, was given in the case of *U.S. v. Hall*, 211 U.S. 497, 498. In that case the jury was in view of the sharp conflict in the evidence upon such a material issue it was instructed that the jury should have been carefully instructed as to the rules which should govern them in weighing the evidence of the respective witnesses, and, after a very full discussion, that the effect of the words, "which they so believed," was to eliminate from the consideration of the jury the evidence of one witness, if any such there was, who had either sworn falsely upon a material matter, unless the jury believed such ~~extraneous~~ evidence to be true. *Hall*.

There is a slight difference between the two instructions in phraseology; it is not even as words the rules applicable to the case at bar. It cannot compare with the instruction at *Hall* in that in view of the circumstances of the case and the rule stated therein by the jury the instruction was erroneous. It was held no witness was shown to have sworn falsely and material evidence to any material element in the case is being considered. Two out of three of the jury found the jury were in error. It was held, therefore, that the instruction was correct in light of the facts and circumstances of the case in question and that evidence was not to be given. It was *Hall*'s duty, which was evidence to be given, that the alleged to which effect it was to be full effect, and that the one was stated as such, but in the ground while the one was *Hall* to which, and stated again with a few facts. In view of this conflict of evidence on that issue

the rule as to weighing the evidence of the respective witnesses should have been accurately stated.

It is also urged that instruction 19, given at defendant's request, was erroneous. It told the jury:

"If you believe from the evidence that the plaintiff got off or attempted to get off the defendants' car before it had come to a stop and while the said car was still in motion, and that she fell and was injured by reason thereof, then you are instructed that the plaintiff cannot recover."

In view of the contradictory evidence as to whether there was one or two steps, the instruction was calculated to mislead the jury. But whether so or not, the judgment should be reversed because of error in giving instruction 14.

In view of this conclusion it is unnecessary to consider other assigned errors, one of which is that the verdict was manifestly against the weight of the evidence. While we are so disposed to think, yet for the reasons stated the judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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and the fact that the only other person who could have been involved in the murder of the President was the person who was seen in the car with the President at the time of the murder.

100-443887-100

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

Approved: _____ Date: _____

U.S. DEPARTMENT OF AGRICULTURE

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File Numbered 70-698 - Serial 100 - 1st Page of Report

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

32829

250 I.A. 655

ERNEST R. SHIPPE et al.,
Appellants,

v.

THE BANK OF AMERICA,
a corporation, et al.,
Appellees.

APPEAL FROM CIRCUIT COURT,
COCK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellants filed a bill to construe the last will of Sarah F. Wadsworth, deceased, alleging that the twenty-second paragraph thereof is null and void for uncertainty, and as vesting improper discretion in the trustees named in the will. A demurrer thereto having been sustained the bill was dismissed, and this appeal followed.

It is recognized that thereby the court held the bequest in question in said paragraph was valid and binding and that the paragraph is enforceable in all its particulars.

By such paragraph the testatrix bequeathed the rest, residue and remainder of her estate to trustees in trust to sell and dispose of, excepting therefrom the paintings of her son, Frank Russell Wadsworth, and directed that out of the proceeds the trustees purchase a painting for presentation to the Art Institute of Chicago as a memorial to her said son. The will then proceeds to direct the trustees,

"to exhibit, donate, give, loan or sell said paintings of my said son to any art museum, schools, clubs, or individuals as to my said trustees shall seem fit and proper, wholly in their discretion, and to use the balance remaining of said trust fund, and the proceeds of any of said pictures which may be sold, as aforesaid, if any, for the purpose of so exhibiting, handling and caring for said paintings, until such time as the same

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1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a copy of the original letter, and is signed by Abraham Lincoln.

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and a large number of other persons who were present at the time of the attack on the ship. The ship was damaged and the crew was killed. The ship was then taken to the harbor and the crew was buried there. The ship was then taken to the harbor and the crew was buried there.

THE UNITED STATES DEPARTMENT OF THE INTERIOR
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WASHINGTON, D. C. 20250

shall have been finally disposed of in the discretion of my said trustees, and if thereafter any part or portion of said trust fund shall still remain in the hands of my said trustees, I direct that with the same my said trustees purchase one or more paintings, in their discretion, and present the same to such art museums, schools, or clubs as my said trustees, in their discretion, may select."

It is the phrase we have italicized over which the question of construction arises.

Appellants concede that if the phrase means only art museums, art schools or art clubs, their contention is groundless. But they contend that it does not limit the trustees' discretion to art institutions and enables them to present the paintings to any school or club they may select.

When we look to the four corners of the will and especially to the entire paragraph in question, it seems clear that it was the intention of the testatrix to use the proceeds from the sale of the paintings of her son to advance interest in the art of painting. Her son was evidently an artist, or patron of that art, and she apparently desired to turn his works of art to promote the art. For that purpose his paintings were expressly excepted from the residue of the estate with directions for their use and sale. While the trustees might donate, loan or sell them, until sold they were to be exhibited or cared for until all were finally disposed of when the resulting proceeds - together with any balance of the trust fund provided for in the first part of the paragraph - were to be used for the purchase of one or more paintings for presentation to any one of said institutions. Until such purchase the temporary use of the son's paintings (or proceeds from such as had been sold) was for purposes designed to advance an interest in art. It was quite in keeping with that intention that the final and permanent use of the trust fund should be devoted to the same end; in other

words, that the art works of her son should ultimately be turned to promote the art of which he was evidently a devotee. That such an intention is disclosed in designating "art museums" is not questioned. That it should have been abandoned if a museum was not selected is hardly consistent with the entire context of the will. We not only think that it accords with her intention but does no violence to grammatical construction to hold that the word "art" was intended to characterize not only the museums but the schools and clubs from which the trustees were to select the donee.

That a bequest for the promotion of art is deemed in law as a bequest to charity has frequently been held. (Eason v. Bloomington Library Ass'n., 237 Ill. 442; Almy v. Jones, 17 N. H. 265 (21 Atl. 616); Herron v. Stanton, 128 N. H. 363 (Ind.).) If, therefore, it be reasonably discernible that it was the intention of the testatrix to devote the proceeds of her son's paintings finally disposed of to the purchase of a painting or paintings to be presented by her trustees to an institution for the charitable purpose and use of promoting an interest in art, it is the duty of the court to give effect to that intention if it can do so without violence to the rules of construction. (Hitchcock v. Board of Home Missions, 259 Ill. 288, 293.) While the phrase in question may be loose, it is not uncommon grammatical usage. At any rate in view of gifts of art to schools and clubs for educational purposes, it is not strained construction to hold that the underlying purpose of the testatrix was to advance interest in the art of painting.

The efforts of the courts of this State have always been to sustain a gift for charity if it can be done, and if the trust for charity is sufficiently certain to enable the courts, in the exercise of their ordinary chancery powers, to carry out

the donor's charitable intent they will not allow the trust to fail. (Kammerer v. Kammerer, 233 Ill. 327; French v. Calkins, 252 Ill. 243.) As said in Hunt v. Fowler, 121 Ill. 269: "There is to be the most liberal construction of the donor's intention, in support of a charitable donation. Charities have always received a more liberal construction than the law will allow in gifts to individuals. 2 Story's Eq. Jur. sec. 1165." It is also said in Grand Prairie Seminary v. Morgan, 171 Ill. 444:

"It seems to be an established rule of interpretation that the court is bound to carry a gift into effect if it can see a general charitable intention consistent with the rules of law even if the particular manner indicated by the donor is illegal or impracticable."

Considering the favor with which the courts look upon gifts which seek to promote art, and their liberal attitude towards charitable trusts, and the intent of the testatrix as disclosed in every ^{other} part of the paragraph in question to donate the residue of her estate to the advancement of art, we have little doubt that it was her intention to convert the remaining part of the trust fund into a gift of a painting or paintings to some institution designed to promote an interest in art and not to make a gift for a mere private or non-charitable purpose.

In the construction we have given to the paragraph there is no uncertainty either as to the subject matter of the trust or as to the beneficiary. It was said in Welch v. Caldwell, 286 Ill. 483, "that will be regarded as certain which may be rendered certain, and certainty is secured where the power of selection or appointment is vested in some person;" and in Bruce v. Maxwell, 311 Ill. 479: "where the statute of 43 Elizabeth is a part of the law" - (as it is in this State, as held in Welch v. Caldwell, supra) - "the disposition of the court has been to permit a great degree of uncertainty as to the

beneficiaries. It is immaterial how uncertain the beneficiaries of a charitable trust are, if there is a legal mode of rendering them certain by means of a trustee appointed."

We think the bill was properly dismissed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

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32853

250 I.A. 655²

LOUELLA BONFONTE,
Defendant in Error.

v.

WILLIAM SMILLIE and BEN JACOBS,
Plaintiffs in Error.

ERROR TO CIRCUIT

COURT, COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The action below was brought by defendant in error against two defendants, Jacobs and Smillie, to recover damages for personal injuries growing out of a collision of their two cars at a street intersection. There was a verdict of guilty as to Jacobs, and a verdict of not guilty as to Smillie. There was a judgment against the former on the verdict for \$12,000.

The declaration consisted of five counts, one of which, that charging wanton and wilful negligence, was withdrawn at the close of the case. In each count was the allegation that "by and through the concurrent negligence of the said defendants, plaintiff was greatly injured." While the motion for a new trial was under advisement plaintiff was given leave, over objection by defendant Jacobs, to file an amendment to each count of the declaration striking out the word "concurrent" wherever it appeared. Jacobs ask for, and was refused, leave to demur to the amended counts, but took leave to file pleas thereto. His fourth plea was the Statute of Limitations, based on the theory that the declaration as amended alleged a new cause of action and the statutory limitation had run. A demurrer to that plea was sustained.

25011.050

1944

WILLIAM WILLIS and JAMES
WILLIS as Defendants
vs.
WILLIAM WILLIS and JAMES
WILLIS as Plaintiffs

WILLIS vs. WILLIS

WILLIS vs. WILLIS

WILLIS vs. WILLIS

The action herein was brought by defendant in error
against two defendants, Isabelle and Willis, to recover damages for
personal injuries resulting out of a collision of their car with a
truck on a highway. There was a verdict in favor of the truck
and a verdict of not guilty as to Isabelle. There was a judgment
against the truck on the verdict for \$12,000.
The decision consisted of five opinions, one of which,
that charging error and other negligence, was rendered at the
close of the case. In each count was the allegation that "by and
through the negligent negligence of the said defendant, Isabelle
Willis was severely injured." This was the action for a new trial and
under relevant authority was given leave, and judgment of the
defendant Isabelle, in this an amendment to each count of the
complaint setting out the facts "materially" changed it appeared.
Isabelle and the truck were returned, leave to them in the amended
counts, but leave to the first count. The second time was
the issue of limitation, based on the twenty-four hour limitation
as amended allowed a new count of claim and the statutory limitation
was not. A summary to this case was submitted.

On the theory that the amendment was improper and the case went to the jury on the original declaration it is urged that there was a variance between the allegations of the declaration and the verdict in that the charge of concurrent negligence would not support a verdict against one defendant only, citing St. Louis Belleville Suburban Co. v. Hopkins, 100 Ill. App. 567, where it was said there could be no concurrent negligence unless both defendants were guilty. But in the case at bar it is alleged in each count that both defendants were negligent in the particular respect charged therein, and because of "their" negligence their vehicles collided with each other, "as a result of which the plaintiff was thrown * * * and greatly injured." Following such allegation in each count is the averment of concurrent negligence. It will thus be seen that regardless of the averment of concurrent negligence there was a specific allegation of negligence by each defendant, which under well established rules would warrant recovery against either or both defendants, according to the evidence. And it is not necessary to prove all of the material allegations of the declaration if enough are proven to make out a cause of action, even though other averments are not proved. (Postal Tel-Cable Co. v. Likes, 225 Ill. 249; Piercem v. Lyon & Healy, 243 Ill. 270.) In the Likes case each count of the declaration set out the negligence charged against each of the joint defendants and alleged the injury resulted to the plaintiff "in consequence of the joint and concert careless and negligent conduct of the defendants." The verdict stood against only one of the defendants. In the Piercem case it was contended that the declaration charged the proximate cause was the combined and concurrent negligence of both defendants, and that a verdict against

On the theory that the defendant was negligent and the
case went to the jury on the evidence it is held that
there was a violation between the allegations of the defendant
and the verdict in favor of the charge of negligent negligence
and support a verdict against the defendant only, finding the
defendant negligent. See W. H. H. v. H. H. H., 101 Cal. 2d 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

one of them only was equivalent to a finding that the charge was not proved. In both cases it was held that under the averment of joint negligence plaintiff was not bound to prove both defendants guilty, and in effect that where there is a charge of negligence by each defendant and the proof supports the charge as to one of them only a verdict against him will stand notwithstanding there may also be a charge of combined and concurrent negligence. The cases of Pennington v. Rowley Bros. et al., 241 Ill. App. 58, and Hartray v. A. T. Willett Co., 232 id. 193, are to the same effect. The latter case was taken by certiorari to the Supreme Court. Its opinion therein affirmed the view of this court. No judgment was rendered thereon, however, because while a petition for rehearing was pending the writ was dismissed on motion of plaintiff in error. We feel justified, however, in referring to the opinion as indicating more explicitly the attitude of that court on this question. Consequently there was no error, as claimed, in submitting different forms of verdict by which either or both defendants might have been found guilty or not guilty.

But under both section 7 of the Statute of Amendments and Joinders, and section 39 of the Practice Act, the amendments allowed to the declaration eliminating the charge of concurrent negligence were proper even if they were not necessary.

Plaintiff in error urges various grounds why a new trial should have been granted; (1) that the verdict was manifestly against the weight of the evidence; (2) that plaintiff was guilty of contributory negligence; (3) that the verdict was excessive and the result of passion and prejudice; (4) improper remarks by the court and improper examination by plaintiff's counsel, and (5) that there was reversible error in the court's rulings.

one of them only was admitted to a finding that the charge was not proved. In both cases it was held that under the provisions of joint negligence claimants was not bound to prove both defendants guilty, and in either case there is a charge of negligence by each defendant and the court requires the charge as to one of them only a finding against the other defendant. The law also be a charge of negligence and negligent negligence. The cases of *Longbottom v. British Overseas Airways Corp.*, [1951] 1 K.B. 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The accident occurred at the juncture of South Park avenue and 59th street, Chicago. The former street runs north and south, and forms the western boundary of Washington Park at the place where the accident occurred. From that point 59th street runs west. Plaintiff was riding in a car belonging to defendant Jacobs and being driven south on South Park avenue by one Booth a member of his family or household. Jacobs sat on the front seat with the driver, and plaintiff on the back seat with Mrs. Russell, housekeeper for defendant and referred to in the record as Mrs. Jacobs. Smillie's car came from the south and had partially turned at the center of the street to go west on 59th street when the cars collided. The evidence tended strongly to show that Smillie's car had reached the intersection and had turned northwesterly to go west on 59th street when plaintiff's car was about 100 feet north of the north line of 59th street; that the Smillie car was going slowly at less than 10 miles an hour; that plaintiff's car was going at a speed of 25 to 30 miles an hour before it reached the intersection, and increased its speed to 35 miles at or just before reaching 59th street, evidently to pass in front of Smillie's car which was then at or near the center of the intersection and partially turned towards the west. There was some controversy as to which car struck the other. But we think it immaterial if defendant Jacobs was chargeable with negligence. As a result of the collision the left front wheel of Smillie's car was torn off and that corner of his car damaged, and the left fender and rear wheel of Jacobs' car were damaged. By coming in contact after the collision with the lamp-post at the southwest corner of the intersection, the right side of Jacobs' car was so completely demolished

[illegible]

as to indicate that the car was driven at the great speed testified to by plaintiff and her witnesses.

We deem it unnecessary to review the evidence in detail. For if, as we think, the jury might reasonably find that before Jacobs' car entered the intersection its driver could see from the approach and position of Smillie's car it would be dangerous to attempt to pass in front of it, then the jury was justified in finding Jacobs guilty of negligence.

But appellant contends that under the statute his car had the right of way. But one having the technical right of way is not free to assert it when he can see that by so doing a collision with another is likely to happen, even if the driver of the latter car wrongfully disregards such right. His negligence would not be excused by the latter's. If, as plaintiff testified, she foresaw a collision was inevitable, the driver of the car must also have foreseen it.

But it is urged that plaintiff did not exercise ordinary care for her own safety by failing to warn the driver when she foresaw a collision was inevitable, and, as she said, closed her eyes and braced herself. At that time the car was only about 100 feet from the point of collision. At the rate of speed testified to, it would have passed over that space within about two seconds. While it was said in Pienta v. C. & N. Ry. Co., 234 Ill. 246, "it is also the duty of a mere passenger in the vehicle, where he has an opportunity to learn of the danger and avoid it, to warn the driver of the vehicle of such danger, "it is clear from such a state of facts that no warning could have been effective after the danger became apparent to plaintiff." In fact, at such a time a warning would have been more likely to confuse than to aid the driver in managing the car. As said in Hoffman v. Yellow Cab Co., 238

as to indicate that the law was given as the great moral principle
to be followed and not otherwise.

It seems to me that the law is given as the great moral principle

for it, as we think, the law is given as the great moral principle

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Ill. App. 269: "A warning to the driver from a rear-seat passenger might well distract the driver's attention thereby tending rather to cause than to prevent such an accident." In Jerkv v. Buffalo R. & P. Ry. Co., 119 Atl. 543, (Pa.) the court said: "A passenger is not required to warn the driver of what the latter already knows and appreciates; to do so would tend to increase the danger."

Similar language was used in Metc v. Yellow Cab Co., 248 Ill. App.

609. In Ohio Electric Co. v. Evans, 134 N. E. 519, it was said:

"In circumstances of great and sudden peril, meddlesome interference with the one having control either by physical act or by disturbing suggestions or needless warnings may be exceedingly disastrous in its results," and while a passenger in an automobile must himself use reasonable care for his own safety "he should not in every case be held guilty of contributory negligence merely because he has done nothing." Under the circumstances we do not think plaintiff was chargeable with contributory negligence.

It is also urged that because the parties in Jacobs' car were going on a pleasure trip and plaintiff had assisted Mrs. Jacobs in preparing sandwiches for the occasion the car was being used in a "joint enterprise" and, therefore, defendant was relieved from liability to plaintiff. The doctrine evoked has no application to such a state of facts. Besides the evidence sustains the claim of an invitation from defendant Jacobs and Mrs. Jacobs to plaintiff to ride in the car as their guest on that occasion.

As to the claim that the verdict was excessive, it appears that plaintiff was cut about the face and shoulders, requiring stitches on both to be taken, and as a result of infection caused by the wounds so received she had for several months abscesses and boils about them. There was a fracture of the fifth lumbar vertebra

III. App. 2891 "A writer to the Editor from a newspaper
 must not discuss the Editor's editorial policy before
 to come from the Editor's office." In Smith v. Jones, 12
 2 P. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

from which she suffered confinement and great pain. She was confined in a hospital for a month, with a cast around her body above the hips, and for another month in bed at her home, and for a month and a-half in a hospital for convalescents. In all she was absent from her place of employment for about eight months. The accident brought on again her menstruation, which had just ceased. Since the accident the intensity of pain during her menstrual periods, not experienced before the accident, has necessitated a hypodermic. At such times she had fainting spells after resuming employment. She still suffers pains in her back. She weighed 98 pounds before the accident and lost about 25 pounds thereafter. As she was healthy and active before the accident the jury might well infer that these conditions were the proximate result of the accident. We are not able to say that the verdict was manifestly excessive.

Appellant contends, however, that the size of the verdict may be accounted for by prejudicial incidents during the trial. It appeared on cross-examination that plaintiff had been paid her salary by her employer while she was thus unable to work. Her counsel then asked if "any arrangement was made with regard to that." She answered: "In view of the fact that I was an orphan and had no other means of support, there was a special session of the board of directors called, and it was decided that in any case they would pay me." Defendant moved to strike the answer, and also to withdraw a juror. Both motions were overruled. While we think the answer should have been stricken, we do not think it was calculated to arouse any such sympathy in the jury as would account for or affect the size of the verdict. The jury knew that plaintiff, who was over 21 years of age at the time of the accident, could not properly be referred to

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as an orphan, and had reached the age when it is not an uncommon thing for young women to support themselves. The fact that she drew her salary during her absence from employment was, without a specific instruction on the question, more likely to influence the jury to lessen than to increase the verdict.

As another prejudicial incident it is claimed that the court erred in permitting improper questions to Dr. Damiani, who took the X-rays of plaintiff's neck and shoulders and also of her lumbar vertebrae at the hospital where she was taken shortly after the accident by Dr. Weil, a physician called by defendant Jacobs. Damiani, as custodian of the films at the hospital, was called by plaintiff to produce them at the trial. They had disappeared. Plaintiff's counsel sought to account for their disappearance. Answers of the witness that he thought Dr. Weil had them, or had taken them away, were stricken. After a futile effort to learn from the witness just how the films had disappeared, counsel drew from him that it was his best recollection that they were never put in the hospital files and that Dr. Weil took them away, and that the witness had made a report of his findings from the films to Dr. Weil and to the hospital. As the prolonged examination seemed to carry the inference that the films may have been taken by Dr. Weil, defendant's counsel suggested that he be subpoenaed. Later Dr. Weil was called by plaintiff to the stand and testified that he went to the hospital to see the films, at the instance of defendant, shortly before the trial to refresh his memory and was not able to find them after making a search, and did not know where they were, and stated "if they are not at my office or at the Columbus Hospital, it is my opinion that they are lost." After he so testified and also said on the occasion of his examining the films he was accompanied by one of defendant's counsel - who withdrew as his attorney

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to testify - defendant's counsel said: "I am willing to let this whole hospital record go in. I withdraw my objection, let it all go in." If the examination carried the intimation that defendant's physician, Dr. Weil, or the attorney for defendant accompanying him at that time had caused the disappearance of the films showing the condition of plaintiff's lumbar vertebrae, we cannot but be impressed that it was warranted by the testimony of Dr. Weil himself, and that this was so manifest that defendant's counsel was willing to dispense with the best evidence on the subject and accept the secondary evidence of such report.

Complaints are made of what we deem inconsequential and harmless remarks by the trial judge. One, directed to one of defendant's witnesses while testifying, was, "None of us are hard of hearing." Though grammatically subject to criticism, it is difficult to perceive in what respect it was prejudicial. Another referred to "the pleasant and happy facial expression" of an assistant of plaintiff's counsel. Without photographs we cannot say the compliment was undeserved, or that there was any unjust discrimination in not paying a like compliment to defendant's counsel. How in any other respect it was prejudicial we fail to see. Such complaints are too trivial to be imposed upon an appellate court's consideration.

Complaint is also made of remarks by plaintiff's counsel. He called the court's attention to signs of approval and disapproval by defendant Jacobs in nodding or shaking his head when a witness was testifying, and asked that the record so show. The court said: "I want the record to show it just as it was stated by the counsel." Presumably the fact came to the court's own observation, and if so, it would have been justified, as then requested by plaintiff's counsel, in admonishing defendant to discontinue thus registering

is really - testimony's content which I am willing to let this
 while having to read to me. I believe in testimony, but it is
 so far. If the commission were to the testimony that testimony's
 physician, Dr. Bell, or the attorney for the defense, or the
 of that time had shown the statements of the time showing the
 condition of plaintiff's health condition, we would not be surprised
 that it was mentioned by the testimony of Dr. Bell himself, and that
 this was no matter that testimony's content was willing to discuss
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Complaints are made of that we have investigated and
 business records by the local judge. The complaint is made of
 testimony's statement with testimony, and, then, at the time
 of hearing. Though testimony's report is testimony, it is
 difficult to believe in what is said it was testified. Another
 referred to "the statement and report of testimony" as an example
 of testimony's content. Though testimony's content is not the
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before the jury his approval or disapproval of testimony of witnesses. And defendant can hardly complain of such remarks or requests thus called forth by his own improprieties in the presence of the jury.

It is also contended that the court erred in admitting evidence of the X-ray films of plaintiff's lumbar vertebrae taken shortly before the trial without proof of some relation between them and the accident. As we read the evidence the films disclosed nothing different from what had already been received in evidence as the showing of the lost films. Besides, a relation was properly inferable without direct proof that plaintiff had not suffered another accident in the meantime.

We think there is no reversible error, and that the judgment should be affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

before the jury and appeared as witnesses at defendant's trial. The defendant was found guilty of the crime and was sentenced to the State Prison for a term of years. The defendant has since been released on parole.

It is also noted that the defendant was in custody of the State Prison at the time of the trial. The defendant was found guilty of the crime and was sentenced to the State Prison for a term of years. The defendant has since been released on parole.

Defendant should be released.

WITNESSES:

Defendant to be released, 11, 1911.

32853

LURELLA BOMFONTE,
Defendant in Error,

v.

WILLIAM SMILLIE and
ABE JACOBS,
Plaintiffs in Error.

2007
250 I.A. 655⁷
ERROR TO CIRCUIT COURT,
COOK COUNTY.

ADDITIONAL OPINION ON PETITION FOR REHEARING.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

A point which we deemed so manifestly unavailing as to be unnecessary to mention in our opinion is urged anew on a petition for rehearing, namely, that the record does not disclose that any other form of verdict than that signed by the jury was handed to them. Even were this so, there is nothing in the record to indicate it or on which to predicate error in the matter.

The point was not raised until the hearing of the motion for a new trial, when learning in some way that other forms of verdict which the record shows were read by the court to the jury had not been marked by the court as filed when the verdict was returned, counsel for defendant asserted without anything to substantiate the claim, and at the same time admitting that he did not know, that said forms were never handed to the jury.

The court thereupon stated that it knew of its own knowledge that they were - a fact at that time still in the breast of the court - and stated that on reconvening of the court it directed the clerk to file such forms as of the date of the verdict.

5501 A. 055

RECEIVED
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C.

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Thereupon plaintiffs' counsel asked that the bailiff be sworn to verify the court's statement, which was done over defendant's objection, but it was unnecessary and futile to inform the court of that of which it had judicial knowledge.

Defendant could have prepared different forms of verdict suitable to the issues and have requested the court either to instruct the jury with respect to the use of such forms, or to have them given to the jury, and if the court had refused to comply with the request he could have preserved the ruling for review. That was not done. The only point preserved for review was the futile one in calling the bailiff to be sworn as aforesaid.

While there is nothing to the point yet the bill of exceptions shows that the various forms of verdict read to the jury were in fact handed to them when they retired to consider their verdict.

The other points presented in the petition for rehearing were fully considered in our opinion and no good reason is presented why the petition should be allowed. It will be denied.

REHEARING DENIED.

Gridley, P. J., and Scanlan, J., concur.

32362

250 I.A. 655³

SEYMOUR LEWIS,
Appellee.

v.

ESTHER LIEBSOW,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was a scire facias proceeding to revive a judgment of the court entered July 27, 1917. After allowing the judgment debtor credits not in question upon this appeal the judgment was revived in the amount of \$1624.37.

The pleadings reduced the issue to one question, whether the judgment had been paid or satisfied. The proof did not sustain the defense. Appellant abandons that claim here and relies on incompetent evidence, received by the court over plaintiff's objection, to the effect that defendant's signature to the note on which the judgment was entered was forged, and that her motion to vacate said judgment on that ground was withdrawn as a result of an agreement between the parties whereby execution on the judgment was to be stayed for one year. It is argued the agreement was one in effect to compound a felony. While we do not think the evidence received on that subject sustains that claim, yet we shall not review the same as the only defenses available in such a proceeding are, that there is no such record, or that the judgment had been paid or released, or that there has been an accord and satisfaction.

(Bickerdike v. Allen, 187 Ill. 97, 103; Waterbury National Bank v. Reed, 231 Ill. 246, 250; Bank of Kauolaire v. Reed, 232 Ill. 238, 240.) None of these defenses was proven or is relied upon on this appeal. While the court improperly received evidence of what might have been pleaded in the former action (Bickerdike v. Allen, supra), and evidence of an agreement entered into subsequent to the entry of the original judgment which had no tendency to invalidate the judgment, the court evidently and properly disregarded the same.

The judgment is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

32712

250 I.A. 655 4

MAX KUSHNER and FRED K. HAMILTON,
trading as Kushner & Hamilton,
complainants below,
Appellees,

v.

ISADORE SALTZMAN et al., defendants
below, FOREMAN TRUST & SAVINGS BANK,
a corporation, ANDREW L. BENSON,
WILHELMINA B. HARRIS, NOVA KAUF ERNE,
Appellees, On appeal GENERAL WRECKING
& LUMBER COMPANY, a corporation,
intervening petitioner,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by General Wrecking & Lumber Company, a corporation, from a decree of the Circuit Court of Cook County, directing the sale of the premises described in the bill of complaint, commonly known as number 4147 Lake Park avenue, Chicago, to satisfy the payment of a first mortgage and a junior mortgage, and two mechanic's liens. Max Kushner and Fred K. Hamilton, trading as Kushner & Hamilton, filed a bill to enforce a mechanic's lien for \$2,000 for work, material and labor furnished by the complainants for painting and decorating the building on the premises in question. Thereafter, the General Wrecking & Lumber Company filed its intervening petition to enforce a mechanic's lien against the premises for the amount of \$9,486 for work, labor and material claimed to have been rendered in repairing and reconstructing the building on the premises. Foreman Trust & Savings Bank and Andrew L. Benson et al. were made parties defendant to the intervening petition and they filed their respective answers to the same. Foreman Trust & Savings

Bank claimed a paramount lien against the premises under a certain trust deed for the sum of \$25,000 and Andrew L. Benson et al. claimed a lien for the sum of \$8,704.46 under a certain second mortgage subject only to the lien of the bank. Each of said mortgagees disputed the amounts claimed by said contractors. The cause was referred to a master, who, after extended hearings, made a report, to which certain exceptions were filed by the General Wrecking & Lumber Company. After argument these exceptions were overruled by the chancellor, the master's findings were sustained, and a decree was entered finding the rights and interests of the respective parties in the premises as follows: 1. That Kushner and Hamilton had a first and prior lien on said premises, for work, labor and material furnished to the amount of \$300. 2. That the Foreman Trust & Savings Bank had a first and prior lien on said premises and the improvements thereon for the principal sum of \$25,000 with interest thereon, and certain other items, subject, however, to the lien of the complainants and the lien of the General Wrecking & Lumber Company on the improvements on said premises to the extent of the increased value of said improvements caused by the labor and material furnished by said complainants and the General Wrecking & Lumber Company. 3. That Andrew L. Benson et al. had a lien on said premises to the amount of \$8,932.75, subject and subordinate to the lien of the Foreman Trust & Savings Bank and subject further to the liens of the complainants and the General Wrecking & Lumber Company on the improvements on said premises to the extent of the increased value of such improvements caused by labor and material respectively furnished by them. 4. That the General Wrecking & Lumber Company had a mechanic's lien for the sum of \$7,114.83 on the

improvements on said premises to the extent of the increased value of such improvements caused by labor and material furnished by it to the premises. The decree further found that there was due and owing to the General Wrecking & Lumber Company the sum of \$338.79, with interest thereon at five per cent per annum from May 25, 1925; that said sum was advanced in payment of the 1924 taxes on the premises, but this amount was not allowed as part of the claim of the company for which it was entitled to a mechanic's lien.

It appears from the proof that in 1923 the building on the premises in question was partly destroyed by fire and that thereafter Philip M. O'Connell acquired title to the property subject to a trust deed dated July 1, 1901, given to secure several notes, on which there remained, in the fall of 1924, an unpaid balance of \$7,000. These notes were owned by the Provident Mutual Life Insurance Company of Philadelphia. The premises were further subject to a trust deed to Joseph S. Daly, dated December 19, 1923, given to secure a total indebtedness of \$23,000. This trust deed was subject to the trust deed of July 1, 1901. The notes given to evidence the indebtedness under the second trust deed were owned by the defendants, Andrew L. Benson et al. On or about November 5, 1924, one Saltzman, acting on behalf of O'Connell, applied to the Foreman Trust & Savings Bank for a loan of \$25,000, the proceeds of the same to be used in refinancing the two mortgage loans then on the premises so as to relieve O'Connell of the burden of meeting these loans that were about to become due. O'Connell at once executed principal notes totaling \$25,000, together with interest notes, all dated November 4, 1924; also a trust deed securing the same, which was then recorded by the bank. The bank then made an

application for a guaranty policy to the Chicago Title & Trust Company. That company issued an opinion of title, February 4, 1925, that showed the aforementioned trust deeds as prior liens and also the claim for mechanic's lien filed by the complainants, Max Kushner and Fred K. Hamilton, trading as Kushner & Hamilton. Foreman Trust & Savings Bank, on May 26, 1925, delivered to the Title & Trust Company, in escrow, a check for \$23,600.60, to be paid out by the Title & Trust Company to the owners of the notes secured by the first and second mortgages when the Trust Company was prepared to issue its guaranty policy guaranteeing the trust deed of the Foreman Trust & Savings Bank to be a first mortgage on the premises. It then appeared that the amount deposited was not sufficient to pay the two prior incumbrances with the interest that had accrued on the same and the taxes which remained unpaid, and Saltzman thereupon turned over to the Title & Trust Company an additional sum of \$550 and also a check of the General Wrecking & Lumber Company to pay the 1924 taxes on the property. Further difficulties arose, and about August 1, 1925, the money deposited with the Title & Trust Company was returned to the bank and the matter of the loan was apparently abandoned, but the bank did not release the trust deed of November 4, 1924, nor return to O'Connell the notes secured by the same. Meanwhile, on March 25, 1925, the General Wrecking & Lumber Company had filed a mechanic's lien claim for \$9,486 with the clerk of the Circuit Court of Cook County for work, labor and material alleged to have been rendered in repairing and reconstructing the building on the premises. On or about September 5, 1925, O'Connell resumed the loan negotiations with the bank and as a result of the same, and in accordance with its agreement with O'Connell, the bank, on September 13, 1925, paid to

the Provident Mutual Life Insurance Company the sum of \$7,449.20 and received from it the notes it held and also a release deed releasing the trust deed of July 1, 1901. At the same time the bank paid to the defendants Andrew L. Benson et al. the sum of \$16,151.40 and obtained from them the notes they held and a release deed releasing the trust deed of December 19, 1923, and on September 9, 1925, the bank recorded said release deeds. There still remained a balance of \$8,704.06 due the defendants Andrew L. Benson et al. on the second mortgage of December 20, 1923, and in payment of the same O'Connell gave Benson et al. a new second mortgage and notes in the aggregate sum of \$8,706, dated September 10, 1925, and this trust deed was recorded on the same date.

Generalrecking & Lumber Company, a corporation, appellant, contends that "the finding of the court below is contrary to the weight of the evidence as to the amount due and owing appellant and appellant was, under the evidence, entitled to a decree for at least \$9,614 instead of \$7,114.83, as found by the court." After a careful consideration of all the facts and circumstances bearing upon the present contention, we are satisfied that it is without merit. In view of the somewhat indefinite proof as to the items that constituted the claim, we think there is force in the contention of the appellees that the master and the chancellor were liberal as to the amount allowed the appellant.

The appellant further contends that "the whole decree of the court below is obviously erroneous in so far as it gives either of the appellees Andrew L. Benson, et al. and Foreman Trust & Savings Bank a lien against any part of the premises in question superior or paramount to the lien of the appellant." In support of the present contention the appellant argues, at length, that the proof shows that the Foreman Trust & Savings Bank, prior to the time it finally made the loan in question, was actually apprised

of the claims and rights of the appellant. While it is true that the appellant introduced evidence tending to support its claim that the bank, prior to the time it made the loan in question, was aware of the claims and rights of the appellant, it is also true that evidence offered by the appellees directly rebutted that offered by the appellant, and the master and the chancellor apparently decided the issue adversely to the appellant. But, in any event, the bank and Benson et al. at the time the original first and second mortgages were paid, in September, 1925, had constructive notice of the mechanic's lien claim filed by the appellant in the Circuit Court in March, 1925. After a very careful consideration of the instant contention of the appellant, we have reached the conclusion that it cannot be sustained. It is clear from the evidence that the bank paid the original first and second mortgages at the request of O'Connell, and it was therefore not a mere volunteer. (Home Savings Bank v. Bierstadt, 168 Ill. 618.) No other reasonable conclusion can be reached from the evidence than that the bank paid the original mortgages upon the understanding with O'Connell that it would receive a first lien for the money advanced, and under such circumstances the bank, in equity, will be subrogated to the rights of the first mortgagees. (Idem.) The proof shows that Benson et al. never intended to surrender the lien that they held under the mortgage of December 19, 1923. They released that mortgage for the sole purpose of enabling O'Connell to consummate the loan with the bank, the proceeds of which were to be used in payment of the first original mortgage and in partial payment of the second original mortgage; for the balance that remained due under the second original mortgage a new junior mortgage and notes were to be given. The release of the second original mortgage by Benson et al. and the receipt by them of the new junior mortgage and notes were parts of the same transaction. Under the circumstances of this case Benson et al. did not abandon or lose the

lien of the second original mortgage. (See United States v. Grover, 227 Fed. 181.)

The appellant further contends that "the decree is clearly erroneous in that in the application of the so-called principle of 'subrogation' the court has given each of appellees Foreman Trust & Savings Bank and Andrew L. Benson et al. a lien on the lands in question for an amount in excess of the total amount due and owing under the antecedent and original first and second mortgages which had been released of record by release deeds on September 13, 1925." This contention is a meritorious one. It appears from the undisputed evidence that the bank paid to Provident Mutual Life Insurance Company of Philadelphia the sum of \$7,449.20 in liquidation of the original first mortgage, and to Benson et al. it paid \$16,151.40 as a partial payment upon the amount due then under the second original mortgage. These two items totaled \$23,600.60, and this amount is all that the bank paid in the matter of the first and second original mortgages. The decree gave Foreman Trust & Savings Bank a first and prior lien on said premises and the improvements thereon for the principal sum of \$25,000, with interest thereon, and for certain other items charged by the bank to O'Connell, in all the sum of \$25,750. The bank stood in the shoes of the original first and second mortgages and could be subrogated to no greater rights than they possessed at the time of the payment of their notes. As to the appellant, General Wrecking & Lumber Company, therefore, the bank was entitled only to a priority in the amount of \$23,600.60, and the decree must be modified in this regard.

The appellant also contends that in the application of the doctrine of subrogation the decree allows Benson et al. too large an amount. However, the excess as claimed by the appellant is so small and its effect on the rights of the appellant so trifling that this contention need not be noticed.

The decree of the Circuit Court of Cook County, in all respects save in the one that we have noted, is affirmed, and the cause is remanded to the Circuit Court with directions to amend the decree in accordance with this opinion; each party to bear its own costs in this court.

AFFIRMED IN PART, AND REVERSED IN
PART WITH DIRECTIONS.

Gridley, P. J., and Barnes, J., concur.

The names of the several towns of this county, in
all respects were in the way of being noted, in addition,
and the names in connection with the several towns, with
in about the same in connection with the several towns
part in the life and death in this county.

THESE ARE THE NAMES OF THE SEVERAL TOWNS
IN THIS COUNTY.

And, in the same manner, the names of the several towns

MARY H. O'DAY, individually, and
FRANK O'DAY and ANNA O'DAY, by
MARY H. O'DAY, their next friend,
Defendants in Error,

v.

SUPREMO TO MUNICIPAL
COURT OF CHICAGO.

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, STABLEMEN
AND HELPERS OF AMERICA,
Plaintiff in Error.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, Mary H. O'Day, individually, and Frank O'Day and Anna O'Day, by Mary H. O'Day, their next friend, plaintiffs, sued International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, defendant, to recover from the defendant a death benefit of \$300 alleged to be due upon a contract of membership held by the deceased in the defendant organization. The plaintiffs claimed to be entitled to the death benefit as the designated beneficiaries of Victor J. O'Day, deceased, who, they alleged, was a member in good standing of the defendant organization at the time of his death. Victor J. O'Day was accidentally drowned August 24, 1926, leaving him surviving Mary H. O'Day, his widow, and Anna O'Day and Frank O'Day, his minor children. The case was tried before the court without a jury and a judgment was entered against the defendant and in favor of the plaintiffs for \$300. This writ of error followed.

The defendant contends that the plaintiffs failed "to make proof of death of Victor J. O'Day satisfactory to the trustees of the defendant organization, as provided by Paragraph (f) of Section 1 of Article 7 of the by-laws of the defendant." It

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clearly appears from the record that the widow of the deceased visited the offices of the defendant organization shortly after the death of her husband and advised the recording secretary of her husband's death and offered to make such proofs in reference to the same as the organization might require. The secretary notified her that it would be unnecessary for her to make any proof of the death of the deceased; that the organization would not pay the death benefit, and he stated as a reason that the deceased, at the time of his death, was not in good standing under the by-laws of the organization. At the same time the secretary offered to refund to Mrs. O'Day all the dues that had been paid the organization by the deceased. Under the circumstances the defendant organization waived the condition requiring the proof of death. (Supreme Lodge O. M. P. v. Meister, 204 Ill. 527, 529.) Supreme Lodge Order of Mutual Protection was a fraternal benefit society.

The defendant next contends that the evidence shows that "plaintiffs' decedent was not a member of the defendant association in good standing for three months continuously, prior to death, and, therefore, plaintiffs cannot recover." It was the contention of the plaintiffs at the trial that the deceased at the time of his death was fully paid up in his dues, and the plaintiffs' evidence made out a prima facie case in this regard. The defendant, in support of its instant contention, introduced in evidence its book account with the deceased and it claims that this account shows that the deceased was not a member in good standing at the time of his death. It appears that Mrs. O'Day, the widow, was an experienced bookkeeper and that on the day she visited the office of the defendant organization to notify it of the death of her husband she was shown, by the secretary, the defendant's book account with her husband, and she testified that

the book account at that time showed that the dues of the deceased were fully paid up at the time of his death. She was corroborated in this testimony by the witness Henry Collins. Petersen, the recording secretary, and the only witness for the defendant, identified this book account of the organization with the deceased, but he did not testify that it was in the same condition as it was when he showed it to Mrs. O'Day and Collins. Nor did he deny that the book account when seen by Mrs. O'Day and Collins showed that the deceased was paid up in his dues at the time of his death, nor that he had offered to refund the dues paid by the deceased to the organization. It is apparent from the record that the trial court found from a consideration of all the evidence, that the deceased at the time of his death was fully paid up in his dues, and we are not disposed to disturb his finding in that regard.

The following are the parts of the by-laws relied upon by the defendant in support of its present contention: "Art. IV. Sec. 7: The dues of the Union shall be \$2.00 per month, payable quarterly in advance. Art. V. Sec. 1: Any member working at the craft who is more than 60 days in arrears in dues shall stand suspended, and must appear before the Executive Board for disposition of the case, and cannot be reinstated unless he pays a new initiation fee, and all the dues charged against him at the time of his suspension. Art. VII. Sec. 1: A Death benefit of \$500.00 will be paid to the near relatives (as hereinafter defined) upon the death of a member in good standing (as hereinafter defined), and subject to the following specific conditions: * * * (c) That the member shall have been in good standing for three months continuously, prior to death."

The following is a copy of the book account of the organization with the deceased as it appeared when it was introduced by the defendant:

| Debits | | Credits | | Balances |
|--------|------|----------------|--------------------------|----------------------------|
| | 1924 | | | |
| Jan | 1924 | \$2.00 | Pd. Jan. 12, 1924, | \$6.00 |
| Feb | | 2.00 | for Jan. Feb. Mar., 1924 | |
| Mar | | 2.00 | | |
| Apr. | | 2.00 | | |
| May | | 2.00 | | |
| June | | 2.00 | | |
| July | | 2.00 | | |
| Aug. | | 2.00 | Pd. 8-12-24 | 6.00 |
| Sept | | 2.00 | for 4-5-6-1924 | |
| Oct | | 2.00 | Pd. 8-19-24 | 6.00 |
| Nov | | 2.00 | for 7-8-9-1924 | |
| Dec. | | 2.00 | | |
| | | <u>\$24.00</u> | | <u>\$18.00</u> owes |
| | | | | \$6.00 for Oct Nov Dec '24 |

| | | | | |
|--------------------|------|----------------|----------------------------|---------------------|
| 1925 | | | | |
| Bal. \$6.00 due on | | | | |
| 10-11-12 '24 | | | | |
| Jan | 1924 | \$2.00 | | |
| Feb | | 2.00 | | |
| Mar | | 2.00 | | |
| Apr | | 2.00 | | |
| May | | 2.00 | Pd. 5-26-25 for | |
| June | | 2.00 | 10-11-12-1924 | 6.00 |
| July | | 2.00 | Pd. 6-2-25 for | |
| Aug | | 2.00 | 1-2-3-1925 | \$6.00 |
| Sept | | 2.00 | Pd. 6-9-25 for | |
| Oct | | 2.00 | 4-5-6-1925 | 6.00 |
| Nov | | 2.00 | | |
| Dec | | 2.00 | | |
| | | <u>\$30.00</u> | | <u>\$18.00</u> Oves |
| | | | bal. of \$12 for 7-8-9-10- | |
| | | | 11-12-1925 | |

| | | | | |
|---------------------------|------|----------------|------------------------|----------------|
| 1926 | | | | |
| Bal. \$12.00 for 7-8-9-10 | | | | |
| 11-12-1925 | | | | |
| Jan | 1926 | \$2.00 | Pd. 1-19-26 for 7-8-9- | |
| Feb | | 2.00 | 10-11-12 '25 | \$12.00 |
| Mar | | 2.00 | | |
| Apr | | 2.00 | | |
| May | | 2.00 | Pd. 5-18-26 for | |
| June | | 2.00 | 1-2-3-1926 | 6.00 |
| July | | 2.00 | Pd. 8-10-26 for | |
| Aug | | 2.00 | 4-5-6-1926 | 6.00 |
| | | <u>\$28.00</u> | | <u>\$24.00</u> |

At the time of the death of the deceased he was not in arrears for his dues more than sixty days, and therefore the provisions of Article V, Section 1, would not apply to him. It is clear that the deceased did not pay his dues in advance as provided for in Article IV, Section 7, but it is equally clear that the deceased was not in the habit of paying his dues in advance

| DATE | DESCRIPTION | AMOUNT | BALANCE |
|-------|-------------|--------|---------|
| 1911 | | | |
| Jan 1 | Balance | 10.00 | 10.00 |
| Feb 1 | Interest | 1.00 | 11.00 |
| Mar 1 | Interest | 1.00 | 12.00 |
| Apr 1 | Interest | 1.00 | 13.00 |
| May 1 | Interest | 1.00 | 14.00 |
| Jun 1 | Interest | 1.00 | 15.00 |
| Jul 1 | Interest | 1.00 | 16.00 |
| Aug 1 | Interest | 1.00 | 17.00 |
| Sep 1 | Interest | 1.00 | 18.00 |
| Oct 1 | Interest | 1.00 | 19.00 |
| Nov 1 | Interest | 1.00 | 20.00 |
| Dec 1 | Interest | 1.00 | 21.00 |
| 1912 | | | |
| Jan 1 | Balance | 21.00 | 21.00 |
| Feb 1 | Interest | 1.00 | 22.00 |
| Mar 1 | Interest | 1.00 | 23.00 |
| Apr 1 | Interest | 1.00 | 24.00 |
| May 1 | Interest | 1.00 | 25.00 |
| Jun 1 | Interest | 1.00 | 26.00 |
| Jul 1 | Interest | 1.00 | 27.00 |
| Aug 1 | Interest | 1.00 | 28.00 |
| Sep 1 | Interest | 1.00 | 29.00 |
| Oct 1 | Interest | 1.00 | 30.00 |
| Nov 1 | Interest | 1.00 | 31.00 |
| Dec 1 | Interest | 1.00 | 32.00 |

| DATE | DESCRIPTION | AMOUNT | BALANCE |
|-------|-------------|--------|---------|
| 1913 | | | |
| Jan 1 | Balance | 32.00 | 32.00 |
| Feb 1 | Interest | 1.00 | 33.00 |
| Mar 1 | Interest | 1.00 | 34.00 |
| Apr 1 | Interest | 1.00 | 35.00 |
| May 1 | Interest | 1.00 | 36.00 |
| Jun 1 | Interest | 1.00 | 37.00 |
| Jul 1 | Interest | 1.00 | 38.00 |
| Aug 1 | Interest | 1.00 | 39.00 |
| Sep 1 | Interest | 1.00 | 40.00 |
| Oct 1 | Interest | 1.00 | 41.00 |
| Nov 1 | Interest | 1.00 | 42.00 |
| Dec 1 | Interest | 1.00 | 43.00 |
| 1914 | | | |
| Jan 1 | Balance | 43.00 | 43.00 |
| Feb 1 | Interest | 1.00 | 44.00 |
| Mar 1 | Interest | 1.00 | 45.00 |
| Apr 1 | Interest | 1.00 | 46.00 |
| May 1 | Interest | 1.00 | 47.00 |
| Jun 1 | Interest | 1.00 | 48.00 |
| Jul 1 | Interest | 1.00 | 49.00 |
| Aug 1 | Interest | 1.00 | 50.00 |
| Sep 1 | Interest | 1.00 | 51.00 |
| Oct 1 | Interest | 1.00 | 52.00 |
| Nov 1 | Interest | 1.00 | 53.00 |
| Dec 1 | Interest | 1.00 | 54.00 |

| DATE | DESCRIPTION | AMOUNT | BALANCE |
|-------|-------------|--------|---------|
| 1915 | | | |
| Jan 1 | Balance | 54.00 | 54.00 |
| Feb 1 | Interest | 1.00 | 55.00 |
| Mar 1 | Interest | 1.00 | 56.00 |
| Apr 1 | Interest | 1.00 | 57.00 |
| May 1 | Interest | 1.00 | 58.00 |
| Jun 1 | Interest | 1.00 | 59.00 |
| Jul 1 | Interest | 1.00 | 60.00 |
| Aug 1 | Interest | 1.00 | 61.00 |
| Sep 1 | Interest | 1.00 | 62.00 |
| Oct 1 | Interest | 1.00 | 63.00 |
| Nov 1 | Interest | 1.00 | 64.00 |
| Dec 1 | Interest | 1.00 | 65.00 |
| 1916 | | | |
| Jan 1 | Balance | 65.00 | 65.00 |
| Feb 1 | Interest | 1.00 | 66.00 |
| Mar 1 | Interest | 1.00 | 67.00 |
| Apr 1 | Interest | 1.00 | 68.00 |
| May 1 | Interest | 1.00 | 69.00 |
| Jun 1 | Interest | 1.00 | 70.00 |
| Jul 1 | Interest | 1.00 | 71.00 |
| Aug 1 | Interest | 1.00 | 72.00 |
| Sep 1 | Interest | 1.00 | 73.00 |
| Oct 1 | Interest | 1.00 | 74.00 |
| Nov 1 | Interest | 1.00 | 75.00 |
| Dec 1 | Interest | 1.00 | 76.00 |

It is the duty of the owner of the business to pay the interest on the loan at the time it is due. If the owner fails to do so, the lender has the right to sue for the amount due. The interest on the loan is a debt, and the owner is liable for it. The lender is entitled to receive the interest on the loan at the time it is due. If the owner fails to pay the interest, the lender has the right to sue for the amount due. The interest on the loan is a debt, and the owner is liable for it. The lender is entitled to receive the interest on the loan at the time it is due. If the owner fails to pay the interest, the lender has the right to sue for the amount due. The interest on the loan is a debt, and the owner is liable for it. The lender is entitled to receive the interest on the loan at the time it is due. If the owner fails to pay the interest, the lender has the right to sue for the amount due.

during the three years of his membership. The plaintiffs introduced evidence to the effect that the deceased had never been required by the organization to appear before the executive board in reference to his dues and that he had never paid a new initiation fee. The defendant raises the point in its brief that this last testimony was given by Mrs. O'Day and that it was inadmissible on that account, but the record does not show that the defendant at the trial made any objection as to the competency of the witness or her testimony. In the case of Jakes v. North American Union, 186 Ill. App. 1, 6, the court said: "plaintiff in error (a fraternal benefit society) had a right to adhere strictly to the provisions of its contract, and to require that Jakes pay his assessments according to the exact terms of the contract, but it could waive that right. Where strict and exact performance in the matter of payments on a contract at the exact times therein specified have been waived for a portion of the time of such contract, and such delayed payments have been accepted without complaint for a considerable time, reasonable notice thereafter of an intention to return to the strict and exact terms of the contract must be given before a forfeiture or a rescission thereof can be declared in law by either party. Palmer v. Ford, 70 Ill. 369; Vider v. Ferguson, 83 Ill. App. 136; Finch & Co. v. New Ohio Washed Coal Co., 156 Ill. App. 589.)" Applying the rule thus stated to the facts of the instant case, we hold that the present contention of the defendant is without merit.

The plaintiffs contend that even if the question of waiver were not in the case, nevertheless, the deceased, under the facts of this case, was a member in good standing of the defendant organization at the time of his death within the meaning and intent of the by-laws of the organization, but in the view that we have taken of this case

during the three years of his membership. The plaintiff's answer
should maintain as the effect that the defendant had never been the
active or the representative as against the association board in
reference to his term and that he had never held a non-industrial
term. The defendant claims the point in the trial that this fact
plaintiff was given by him. When the fact is not established as
that account, but the record does not show that the defendant as
the trial made any objection as to the competency of the witness
or her testimony. In the case of Light v. Light, 100 Mich. 100,
101 L.R.A. 100, 101, the court said: "Plaintiff in error is
testimony possibly given, but a right to refuse evidence as to the
production of the contract, and to refuse that fact was
admission according to the terms of the contract, but it
could not be that right. When the fact is not established in the
matter of payment as a contract as the court found, the question
does not arise but a question of the time of such evidence, and such
delayed payment does not constitute without exception the a non-industrial
fact, defendant's answer, admitted at the instance of plaintiff to the
effect that some of the evidence may be given before a law
failure or a provision inserted in the contract is not to allow plaintiff
to take the fact to the fact to the fact, 100 Mich. 100, 101, 102,
103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118,
the rule that in the case of the contract, the fact that
the present condition of the contract is not in doubt.
The plaintiff's answer that was in the period of active
was not in the case, nevertheless, the defendant, when the facts of
this case, which is not standing at the defendant's organization
at the time of his death within the meaning and intent of the specific
of the organization, but in the fact that he had been at the time

it is not necessary for us to determine this contention.

There is no merit in this writ of error and the judgment of the Municipal Court of Chicago should be and it is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

It is not necessary for us to consider this question.
There is no need of any such
statement of the material facts of this case as it is
in evidence.

Exhibit

Exhibit 1, 2 and 3 are hereby

the first of the exhibits to be presented to the jury.
The second of the exhibits to be presented to the jury
and the third of the exhibits to be presented to the jury
Exhibit 1, 2 and 3 are hereby

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KATHERINE EVERETT,
Appellee.

v.

PHILIP FAZIO,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

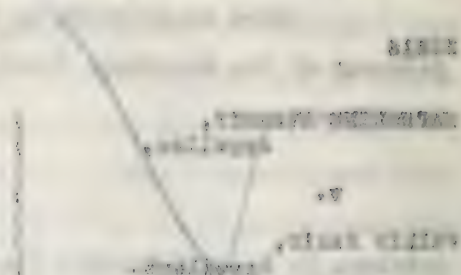
MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Katherine Everett, plaintiff, sued Philip Fazio, defendant, in the Superior Court of Cook County in an action in case. There was a trial before the court with a jury and a verdict returned finding the defendant guilty and assessing the plaintiff's damages at the sum of \$9,000. Judgment was entered on the verdict and this appeal followed.

The plaintiff was about fifty-five years of age at the time she was injured. The accident happened March 24, 1926, about 10:30 a. m., on 63rd street, between Winchester and Lincoln streets, in the City of Chicago. Sixty-third street runs east and west and has street car tracks thereon. Winchester and Lincoln streets run north and south. At the time of the accident an east bound 63rd street car was standing on the west side of Lincoln street and was discharging passengers. The plaintiff was on the south side of 63rd street and started for the north side of that street at a point "100 to 110 feet west of Lincoln," and about 50 feet west of the rear of the standing street car. When she reached the north rail of the east bound track or "the north car line," she was struck by a west bound automobile truck driven by a servant of the defendant. The truck was stopped within five or ten feet

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

the plaintiff's damages at the sum of \$1,000. Judgment was entered on the verdict and this appeal followed.

NOT TO BE USED WITHOUT THE WRITING OF THE DIRECTOR

2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 2681, 2682, 2683, 2684, 2685, 2686, 2687, 2688, 26

approximately in the Fall of 1960. I indicated that I had not yet
 heard of him at that time, however I would not be able to

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Source: The International Child Tax Guide 2013, published by the OECD, available at <http://www.oecd.org/tax/child-tax-guide/>.

Approved for release June 1981 by NSA pursuant to E.O. 13526, Section 1.5
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DATE OF THIS REPORT WILL NOT BE LATER THAN 90 DAYS AFTER THE DATE OF DEATH

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of the place of the accident. The plaintiff testified that before she left the curb on the south side of the street she looked to the east and the west and that she saw no truck coming. There was testimony introduced by the plaintiff and the defendant to the effect that just before the plaintiff was struck she was proceeding with her head down, and the plaintiff, in her testimony, did not rebut this evidence, nor was there any evidence introduced that was inconsistent with it. The testimony of the plaintiff is to the effect that she walked from the curb, but it is not clear from her testimony whether she was walking or running just prior to the accident. The testimony for the defendant is to the effect that the plaintiff was running across the street with her head down. The testimony for the plaintiff was that the automobile, just prior to the collision, was going at the rate of twenty to twenty-five miles an hour. The testimony of the defendant was that the truck, just before the accident, was going at the rate of about fifteen miles an hour.

The defendant has strenuously argued a number of alleged errors in support of the contention that a new trial should be granted, but in the view that we have taken of this case it will be necessary for us to consider only one. The defendant has strenuously argued that the weight of the evidence supports the contention that the plaintiff was not in the exercise of ordinary care at the time of and just prior to the accident. Counsel for the plaintiff, during the trial, stated that the question of liability was a close one.

The defendant contends that the court erred in refusing defendant's requested instruction 23, which was in the following language:

"If you believe, from the evidence, under the instructions of the court, that the plaintiff was suddenly, and without any negligence or fault on the part of the defendant, placed in a position of danger, then, in order to charge the defendant with the duty to

avoid injuring her, the plaintiff must show, by a preponderance of the evidence, that the circumstances were such that the servant of the defendant had time and opportunity to become conscious, by the exercise of ordinary care, of the facts giving rise to such duty, and a reasonable opportunity to perform it, and, if you further believe from the evidence under the instructions of the court, that the circumstances as shown by the evidence did not charge the defendant with the duty as thus defined, or, if you believe from the evidence under the instructions of the court, that the servant of the defendant did not have a reasonable opportunity, by the exercise of ordinary care, to perform such duty as thus defined, then you should find defendant not guilty."

The soundness of the rule of law stated in this instruction is not questioned by the counsel for the plaintiff, but he insists that the instruction is not applicable to the facts of the case. The plaintiff, at the time of the accident, was attempting to cross the street 100 to 110 feet west of the crosswalk, and the defendant's theory of fact was that the chauffeur's view of the plaintiff was obstructed by the standing street car until he passed the same and that he was then but a short distance from her; that the plaintiff was running across the street; that the driver first saw her when he was about eight or ten feet away from her; that he then immediately put on his brakes and swerved the truck to avoid hitting her, and that he stopped the truck within ten feet; and the defendant argues strenuously, and with force, that the driver of the truck had no reason to believe that the plaintiff would attempt to cross the street at the place in question, and that under all the circumstances it was for the jury to say whether the driver had reasonable time and opportunity to become conscious, by the exercise of ordinary care, of the presence of the plaintiff and a reasonable opportunity to avoid hitting her. After a careful consideration of the question, we are of the opinion that under certain facts and circumstances of the instant case the instruction stated a correct rule of law

and that it was highly important to the defendant that it be given to the jury.

The defendant very earnestly contends that he was seriously prejudiced by "misconduct of the plaintiff and her attorney," but as the alleged misconduct is not likely to occur on another trial, we do not deem it necessary to pass upon this contention.

The judgment of the Superior Court of Cook County is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

and it is very important to the Government that it be

On another side, as it has been necessary to have this
statement, but as the statement is not likely to be
officially printed by reference of the Government and has
the statement very seriously intended that the

THE BUREAU OF THE UNITED STATES DEPARTMENT OF THE INTERIOR
WASHINGTON, D. C. 20540

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JACOB G. GROSSBERG,
Appellee,

v.

NATHAN HAFFENBERG and
ESTHER RUTH HAFFENBERG,
Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the Circuit Court of Cook County, Jacob G. Grossberg, complainant, filed his bill against Nathan Haffenberg and Esther Ruth Haffenberg. The complainant and Nathan Haffenberg had been partners in the law business and the bill prayed for an accounting of the partnership dealings and transactions. The bill alleged that certain real estate situated in the City of Chicago came into the hands of the partnership as fees for services rendered and money paid out by the partnership and that the title to the real estate was taken in the name of Esther Ruth Haffenberg, the wife of Nathan Haffenberg, and that she held the real estate in trust for the partnership; and the bill prayed that she be decreed to hold the real estate in trust for the partnership and that she be required to render an account of all rents, incomes and profits received out of said real estate. Nathan Haffenberg filed a cross-bill against Grossberg alleging that there had been a dissolution of the partnership and averring certain agreements in reference to the same; that the cross-complainant and Grossberg had an account stated on April 10, 1925, at which time it was agreed that there was a balance due to the cross-complainant in the sum of \$7,367.71, and that Grossberg then promised to pay to the cross-complainant the said balance.

There was a hearing before the chancellor and a decree entered requiring the complainant and the defendant Nathan Haffenberg to account to each other before a master in chancery, the decree specifying the manner in which the accounting should be had and taken, and the master was ordered to report the evidence heard by him and his statement of the accounts together with his conclusions of fact and of law thereon. As we understand the decree the defendant Esther Ruth Haffenberg was also to account to the complainant. The court expressly reserved jurisdiction for the purpose of determining "what disposition should be made of the real estate, if any, the court should find upon a consideration of the master's report in equity and good conscience should be the property of or is held in trust for the parties hereto or either of them." The defendants, Nathan Haffenberg and Esther Ruth Haffenberg, appealed from this decree. In this court, upon motion of the complainant, Grossberg, the certificate of evidence was stricken from the record.

In their brief the defendants urged several reasons why the decree for an accounting should be reversed but since the filing of the complainant's brief the defendants apparently rely upon the following contention: "We feel that the primary vice is that the decree orders an accounting and then by qualification proceeds to forbid Haffenberg from obtaining an accounting from Grossberg without any showing of facts in the decree or any showing or reason in the record for such discrimination." The contention is also stated as follows: "The discriminatory features of the decree is that Haffenberg is obliged to account for matters subsequent to and independent of the partnership while Grossberg is not." The decree does contain provisions that in full and fair terms require each of the parties

to account to the other. But it also contains (inter alia) the following: "The master is further directed that as to all entries made on the books received in evidence at the hearing in this cause of transactions subsequent to December 1, 1920, he shall receive no evidence but accept as true such entries, but such entries shall be regarded as evidence only of the items shown thereby, but shall not conclude the parties from offering further proof as to credits, if any, which may be due or owing to Grossberg for services rendered by him from and after December 1, 1920, jointly with Nathan Haffenberg in any cause, matter or transaction, or at the special instance and request of Nathan, whether such credits, if any, are due from fees or compensations collected by Nathan or under any special arrangement or agreement made between Grossberg and Nathan for compensation for any such services." (Italics ours.) The defendants complain that there are no facts recited in the decree to warrant the discrimination shown in the italicized portion of the order, and after a careful study of the decree we think the complaint is a meritorious one. In fact, the complainant does not attempt to justify the italicized portion of the order but seeks to sustain the same on technical grounds. In another part of the decree "the master is further directed to take proof and report his conclusions of facts thereon as to what fees or compensations, if any, shall be accounted for by either of the parties to the other under any express or special arrangement for such fees or compensations in connection with matter upon which any service was rendered by either party subsequent to December 1, 1920, and should state the account of same," etc. This part of the decree covers the period subsequent to December 1, 1920, and it is fair to the complainant and the defendants, and is warranted

by the findings of fact in the decree.

The italicized portion of the paragraph in question should be stricken from the decree, and the decree of the Circuit Court of Cook County, in all other respects, is affirmed, and the cause is remanded to the Circuit Court with directions to amend the decree in accordance with this opinion; the complainant and the defendants to bear their respective costs in this court.

AFFIRMED IN PART, AND REVERSED IN PART
WITH DIRECTIONS.

Gridley, P. J., and Barnes, J., concur.

by the findings of fact in the case.
The detailed version of the paragraph in question
should be omitted from the summary, and the essence of the
verdict of fact, in all other respects, is
affirmed, and the same is returned to the district court with
direction to amend the decree in accordance with this opinion;
the complaint and the testimony in this case is
correct in this regard.

ORDERED IN THIS CASE, THE MATTER IS
THIS DAY.

Griffith, D. J., and Galloway, J., concur.

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 6364

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 27 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



RUTH F. RANNEY :
 :
 APPELLANT :
 :
 V S. :
 :
 MILO M. RANNEY, :
 :
 APPELLEE. :

APPEAL FROM CIRCUIT COURT
 OF WOODFORD COUNTY.

Jett: J.

The record in this case discloses that Ruth F. Ranney appellant, filed her bill in the circuit court of Woodford county, in August, 1926, praying for a decree for separate maintenance against Milo M. Ranney, appellee, and an injunction was issued thereon enjoining and restraining appellee from selling or in any manner alienating any of the real estate owned by him.

The record further discloses that the bill filed in August, 1926, was dismissed on April 5th, 1927, and that on March 26th, 1927, appellant had filed a second bill for separate maintenance, which was demurred to by appellee, and the demurrer having been sustained, appellant, by leave of the court, filed an amended and supplemental bill on June 1st, 1927. The amended and supplemental bill was demurred to by appellee and the demurrer, was by the chandellor, sustained, and the appellant elected to abide by her said amended and supplemental bill, and a decree was entered dismissing the same for want of equity. To reverse said decree this appeal is prosecuted.

From the amended and supplemental bill, as the record in this proceeding now stands, it is alleged that on October 30th 1909, the appellant and appellee were married; that four children were born of said marriage, one 15 years of age, one 11 years, one 9, and one four years of age. The grounds relied upon in said bill are excessive sexual intercourse on the part of appellee, striking

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appealant, Ellen Lee Hill is the already named defendant
commonly, in English, 1911, having for a while in English
maintenance against Mrs. E. Hill, appealant, and an indictment
was issued against appellant and defendant common in English
English, or in any manner whatsoever, and of the same nature
owned by him.

of which the first bill filed in
March, 1936, was amended on April 15, 1937, and that on March
28th, 1937, a second bill was filed for amendment.
Amendment, which was amended as by amendment, and the amendment
having been amended, amended, by amendment, and the amendment
amended and amended, amended, by amendment, 1937. The amendment
amended bill was amended as by amendment and the amendment,
and by the amendment, amended, and the amendment filed by
amendment by amendment and amended bill, and a bill was
introduced amending the same for amendment. To amend the
same - the same is amended.

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appellant on two different occasions, using vile and abusive language towards her. It is charged that before the birth of the first child appellee compelled her to submit to excessive sexual intercourse; that the same obtained prior to the birth of the second child, and also charges that appellee struck her when she was carrying the first child, and at a time when she was pregnant with one of her other children, but does not state which one.

It is further alleged by appellant in her said amended and supplemental bill, that appellee in driving an automobile in which she was riding when she was pregnant with one of her children, drove the car over rough roads, which was very injurious to her health.

It is charged that as a result of the course of cruel, inhuman and unkind treatment, rendering her health and life unsafe and her existence miserable, she, on to-wit, shortly after the birth of her last child, ceased to occupy the same apartment and bed with her said husband, and live and co-habit with him, and since that time and still in living separate and apart from him without her fault, though she does live in the same house and seeks to perform her duties as mother of her children.

And in another part of the amended and supplemental bill the following appears:-"Your oratrix further shows that because of the course, inhuman and unkind treatment, language and mannerisms of her above mentioned husband, she was compelled to and did, to-wit, about the year 1921, absent herself from the apartment of her said husband, and said oratrix since that time has not lived with him as his wife, and because her said husband continued said course of treatment, and that gradually the same grew worse, she was compelled to and did in the latter part of 1926, withdraw from the home of her said husband with her four children, and removed to the home of her mother, where she is now living separate and apart from her said husband, who continued to abuse, threaten,

It is further stated on application to the said
 with me of the said Attorney, and that said Attorney
 was carrying the said mail, and at a time when the
 second mail, and also another first class letter was
 delivered; and the same witness is the first of the
 first mail delivered and it would be impossible to
 make certain that it is changed that it would be the
 application to the said Attorney, which will not be made.

to the fact that the only way to get the most out of the machine is to use it in the way it was designed to be used. The only way to get the most out of the machine is to use it in the way it was designed to be used.

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1. The first of these is the fact that the
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annoy and pester your oratrix and of all of her children aforesaid, from September 15th, 1926, almost daily until about the 29th day of November, 1926, when your oratrix removed to the home of her said mother in Metamora, Woodford County, Illinois, where she has been living separate and apart from her said husband, without her fault from thence hitherto." "And further shows that at the time of the filing of her said bill, March 26, 1927, there was then pending another bill, by your oratrix against the said Milo M. Ranney, for separate maintenance, in substantially the same form and containing practically the same allegations as your oratrix's bill of March 26, 1927, and your oratrix had sued out a temporary injunction upon said first mentioned bill, which said temporary injunction was issued, and said first mentioned bill was filed sometime during the month of August, 1926, and which said injunction is the injunction referred to in your oratrix's said bill of March 26th, and which said original bill, which was filed in August, 1926, was dismissed out of this court at the present April Term of this court, to-wit: April 5, 1927, and shows at the time of the filing of your oratrix's said bill, March 26, 1927, and from thence hitherto, she has been and now is living separate and apart from her husband without her fault and living in the home of your oratrix's mother and during all of that time she has had with her the four children named in your oratrix's said bill, filed March 26, 1927, and your oratrix alleges that during all of the said time that your oratrix has so lived separate and apart from her husband without her fault. Her said husband has failed, neglected, refused and declined to furnish your oratrix with any suitable, proper, necessary or other support and maintenance for herself or any of her said children. And further shows that each and every of the allegations in the said original bill of your oratrix filed herein March 26, 1927, and which are hereinbefore set forth are true in substance and in fact in manner and form as therein set forth and alleged."

[illegible]

It is alleged that appellee is an able bodied man and is possessed of considerable property, both real and personal. It is the contention of appellee that the amended and supplemental bill does not allege facts which will entitle the complainant to the relief prayed for in said bill; that it shows on its face that she is not entitled to the relief for which she prays; that it ^{lacks} ~~looks~~ certainty and alleges matters by way of recital and states conclusions, and does not set up facts upon which relief can be granted; that it does not allege any well pleaded facts, but merely sets forth an abundance of details in the form of an abstract of evidence.

The demurrer to the bill admits everything that is well pleaded. The question now is, taking the bill as a whole, did the chancellor err in sustaining the demurrer to the amended and supplemental bill? The charges in the bill, are - (1) Excessive sexual intercourse prior to the birth of the children; (2), striking on two occasions and injury by reckless driving on one occasion. The intercourse complained of all occurred more than five years before the filing of the bill. The first charge of excessive intercourse was 15 years before the bill was filed, and the second instance was 9 or 10 years before the filing of the bill. One of the blows complained of occurred more than 15 years before this proceeding was instituted. The other blow was given eleven years before the beginning of this suit. The reckless driving occurred 14 or 15 years before the filing of the amended and supplemental bill.

The bill shows upon its face that during the time it is claimed appellee cursed and swore at appellant and made the alleged threats about ending it all, was during the time they lived and co-habited together, and was five years before the first bill was filed. From a reading of the bill it will be seen that it is inconsistent and contradictory as to where the complainant

was in fact living at the time the suit was brought. In one part of the bill it is charged that the complainant, in the latter part of 1928, took the four children and removed to the home of her mother. In another part it is alleged that shortly after the birth of her last child, she ceased occupying the same apartment and bed with her husband and living and co-habiting with him, and since that time has been and still is living separate and apart from him without her fault, though she does live in the same house and seeks to perform her duties as mother of the children.

The allegations in a bill are always to be considered most strongly against the pleader, and whenever two inconsistent or contradictory statements are contained in the bill, that which is least favorable to the pleader will be adopted. MacGregor -vs- Miller, 324 Ill. 113-128.

Upon the hearing of a demurrer all the allegations of the bill are to be taken most strongly against the pleader. Fowler vs. Marion & Pittsburg Coal Company, 315 Ill. 312-320. Upon a demurrer to a bill in equity every allegation of the bill is to be taken most strongly against the pleader. Gage -vs- The Village of Wilmette, et al. 315 Ill. 328-331. Separate maintenance proceedings cannot be maintained unless husband and wife are living separate and apart at the time of the filing of the bill. Earle -vs- Earle 60 Ill. App. 360; Will -vs- Will, 134 Ill. App. 67; Smith -vs- Smith 156 Ill. App. 176; A husband and wife who are living in the same house and eating at the same table, but not occupying the same room, are not living separate and apart within the contemplation of the statute. Eleane -vs- Eleane 37 Ill. App. 54; A wife living in the same house with her husband, although occupying a different room and eating at a different time, is not entitled to separate maintenance. Lowe -vs- Lowe 213 Ill. App. 607; Even where grounds for separate maintenance exist, if the wife, with knowledge of the same, continues to live with the husband, this will be held

was in fact living at the time the will was executed. In our hands
of the will is in changed form the testament, as the latter part
of it, from the first edition and printed in the year 1814.
Hence, in answer to the question, it is stated that the will
of the testator, the original testament, the same document and the
will now printed and living and established with the law, and thus
there also has been and still is a testamentary and testamentary
document, and thus, the law is the same, and the same

The assignment is a bill for \$100.00. The bill is dated 1/1/50 and is payable to the order of the Treasurer of the United States. The bill is for the purchase of 1000 copies of the book "The American People" by John Edgar Hoover. The bill is for the purchase of 1000 copies of the book "The American People" by John Edgar Hoover. The bill is for the purchase of 1000 copies of the book "The American People" by John Edgar Hoover.

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to be condonation of the offense and she cannot afterwards without fault on her part, leave him for such cause. In a case where a wife continues to live with her husband for four years after very improper conduct on his part, such living with him will be held to be a condonation of the offense and her separate maintenance.

Deenis -vs- Deenis 65 Ill. 167: Condonation is an act of the mind, either express or implied and it may be indicated by the acts of the parties. It is a bar to a bill for divorce for the cause forgiven, and the principle applies with equal force to application in equity by the wife, living apart from her husband, for a decree for separate maintenance. Deenis -vs- Deenis, Supra.

The allegations of the bill for separate maintenance must clearly show that the husband and wife were living separate and apart at the time of the commencement of the suit, Elemen -vs- Elemen 37 Ill. App. 54; Earle -vs- Earle 60 Ill. App. 360; Pratt -vs- Pratt, 127 Ill. App. 530; Lowe -vs- Lowe 213 Ill. App. 607: In conclusion, in view of the state of the record we are not prepared to say that the circuit court was in error in sustaining a demurrer to the bill and is dismissing the same for want of equity. The decree of the circuit court of Woodford County will therefore be affirmed.

Decree affirmed.

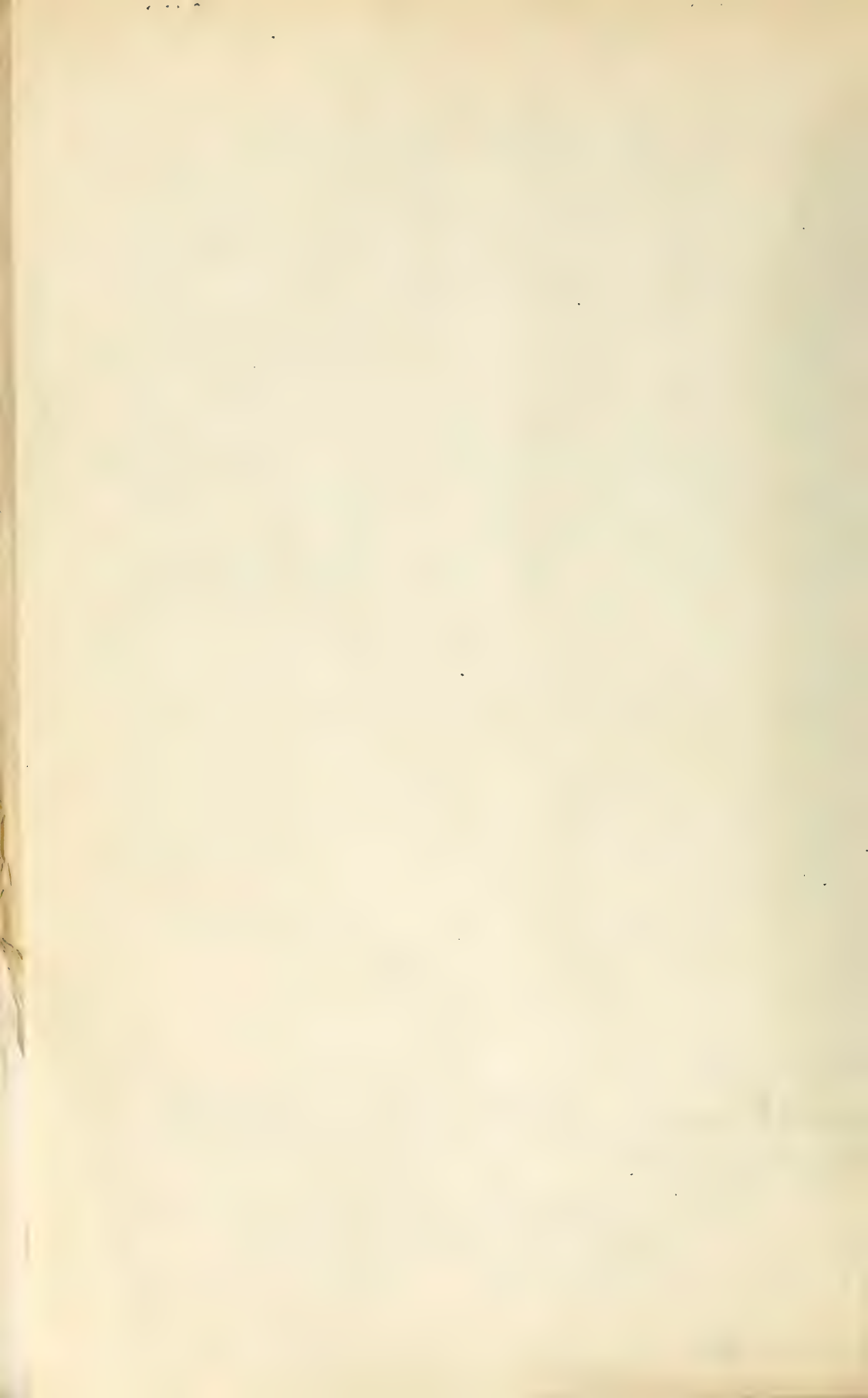
THE UNIVERSITY OF CHICAGO

THE ALLIANCE OF THE FREE TRADE UNIONISTS

STATE OF ILLINOIS, }
 } ss.

SECOND DISTRICT I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand nine
hundred and twenty-_____



abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 657¹

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 27 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

SENECA PETROLEUM COMPANY. :
 A CORPORATION. :
 PLAINTIFF IN ERROR :
 V. :
 H. A. RESCHKE, :
 DEFENDANT IN ERROR. :

FILED TO THE CIRCUIT COURT
 OF HENRY COUNTY.

Jett: J.

This is a suit brought by the Seneca Petroleum Company
 to recover damages for breach of the following contract:-

CONTRACT OF PURCHASE

The Seneca Petroleum Company, of Chicago, Ill. hereinafter called the "Seller" agrees to sell to J. A. Reschke Construction Co., hereinafter called the "Purchaser", agrees to purchase and take the following petroleum products, subject to the terms and conditions hereinafter stated.

Article: No. E2-E3 Road Oil.

Asphaltum.....per cent. E2-50-60 and E3-30 to 70.

All road Oil shipped on this contract guaranteed to conform to the Illinois State Specifications.

Quantity: Approximately 50 to 75 cars.

Shipments: - To be made when specified by the purchaser, in eight or ten thousand gallon capacity tank cars.

Price: 5 1/8 cents per gallon on E2-50, 4 cents per gallon on E3, F.O.B. Seneseo, Illinois.

Terms: 30 days net, 1 per cent 10 da.

Period Covered:- From April 1st, 1921. to November 1st, 1921.

Should the purchaser fail to fulfill the terms of payment as specified herein the Seller shall have the right to defer further shipments hereunder until payment is made, or may cancel this contract by giving the purchaser written notice of such intention.

The Road Oil sold hereunder is for consumption by the purchaser and not for resale.

All claims against the Seller affecting the Road Oil sold

1998

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1950, and the majority of this increase has been in urban areas. This has led to a concentration of population in a few large cities, which has in turn led to a number of social and economic problems. One of the main problems is the problem of housing. The demand for housing in urban areas has increased enormously, and this has led to a shortage of housing and a rise in the cost of housing. Another problem is the problem of transportation. The concentration of population in urban areas has led to a need for a more efficient system of transportation, and this has led to the development of the automobile and the bus. The third problem is the problem of pollution. The concentration of population in urban areas has led to a concentration of industry and commerce, which has in turn led to a concentration of pollution. This has led to a number of health and environmental problems, and it is one of the main reasons why many people are now moving out of urban areas and into the countryside.

The above information was obtained from the records of the
 Federal Bureau of Investigation, Washington, D. C., and is being
 furnished to you for your information.

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hereunder, of whatever nature, shall be filed in writing within forty-eight (48) hours after receipt of the carload involved and prior to the unloading of said car, and should the Seller affirm any claim of the Purchaser, then the Seller shall pay any demurrage charges that may have accrued on the carload involved. In witness whereof, the parties hereto have affixed their signatures to this agreement (in duplicate) this 14th day of December, 1923.

Seneca Petroleum Company, Inc.

By C. W. Matthews.

Approved:

O. E. Hulse.

H. A. Reschke Construction Co.

By H. A. Reschke.

Subject to approval of O. E. Hulse.

The record discloses that the suit was originally brought against H. A. Reschke, Construction Company, a corporation; the defendant filed a plea in abatement, setting up the fact that prior to the execution of the contract the corporation had dissolved, and that H. A. Reschke, from and after September 10th, 1923, individually transacted business under the name and style of H. A. Reschke Construction Company.

The declaration was amended and the suit progressed against the defendant under the declaration as amended. The defendant Reschke, on June 12th, 1925, filed a general and special demurrer to the declaration as amended; the court sustained the demurrer and gave leave to file an amended declaration. Again an amended declaration was filed April 28, 1926, and on May 1, 1926, the defendant moved to strike the 2nd amended declaration from the files. On December 2nd, 1926, the motion to strike the amended declaration was stricken. Plaintiff thereupon moved to set aside the order striking the amended declaration, and on February 16th, 1927, the motion was heard and denied. On March 10th, 1927, a stipulation was entered into by the parties to the proceeding that the motion to strike the amended declaration

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is engaged in any activities which might be considered as a threat to the security of the United States.

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continued with the same results and the difference in the results was not significant.

THESE ARE THE RESULTS OF THE INVESTIGATION OF THE CASE OF THE

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1. *Journal of the American Medical Association*, 1977; 237: 1001-1002.

should be deemed and treated as a demurrer. Plaintiff thereupon elected to stand by its amended declaration, filed April 28th 1926, and to plead no further and the court dismissed the suit at plaintiff's cost. The plaintiff prosecutes this writ of error. The declaration consists of two counts: The first count, after setting out the contract declared upon, avers that in and by said contract it was agreed that the purchaser, within a reasonable time should specify when shipment should be made by the plaintiff, of the oil in said contract mentioned and that said shipment should be made between April 1st, 1924, and November 1st, 1924, but that the defendant neglected and refused to specify when said oil should be shipped, and has refused to accept any such oil, and that the plaintiff at all times, within a reasonable period after the execution of the said contract, to-wit, from the 14th day of December, 1923, up to the first day of January 1925, stood ready to make shipment as specified in said contract, whereby and by reason of said refusal and neglect of the said defendant to specify when said oil should be shipped, and to purchase and take the oil in said contract mentioned, plaintiff has suffered damages in a large sum to-wit, in the sum of \$3,000.00

The second count, after setting out the contract avers that the plaintiff stood ready to comply with the terms of said contract and to ship said oil when specified by the defendant, in eight and ten thousand gallon capacity tank cars, but that from thence hitherto the defendant has neglected, failed and refused to specify when such shipment should be made, and has failed wholly to comply with its contract to purchase and to take the road oil in said contract specified, whereby the plaintiff has lost great gains and profits, that it otherwise would and could have realized on the sale of said oil, and has been otherwise damaged, to the damage of the plaintiff in the sum of \$3,000.00. For the purposes of this opinion

plaintiff in error is called "plaintiff" and defendant in error is called "defendant."

The principal question arising on this record

is as to whether or not the contract in question is sufficiently specific on which to base a right of recovery? It is the contention of the plaintiff that when the month is stated in a written contract, which omits to state the year, intended, it will be inferred in the absence of any implication to the contrary, that it is the indicated month then next ensuing. On the other hand it is the contention of the defendant that the period covered by the contract, and the terms thereof, is expressly stated on the face of the same, as being from April 1st, 1921. to November 1922. that it is not uncertain, and that while the year may not have been the one which plaintiff now contends was intended, yet the contract is definite as to the period covered, and the plaintiff is bound by law by the written language of the contract.

It is further insisted by the defendant that there is no room for construction by the court of this contract, because with respect to the period covered, the dates are clear and definite. The defendant argues that the period from April 1st, 1921. to November 1st, 1922. is long since past and that it would be wholly impossible for any person to either sell or buy oil during the period stipulated by the contract.

In Vol. 13 Corpus Juris, page 538, under the head of Clerical Errors and Omissions, the rule is announced: "The contract must be read according to the intent of the parties in spite of clerical errors and omissions, which, if followed, would change that intention," and in Sub-division "C" on said page, it is said "When the month is stated in a written contract, which omits to state the year intended, it will be inferred in the absence of any implication to the contrary, that it is the designated month then next ensuing." This rule finds support in Fogard vs. Earhan 56 Oregon 269, 108 Pac. 514.

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There are two ways to solve this problem. The first way is to use a loop to iterate through the array and calculate the sum of the elements. The second way is to use the built-in `sum()` function.

CONFIDENTIAL - SECURITY INFORMATION

to be used by the U.S. Office of the Inspector General.

It is further intended by the following that the

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

© 2000 Blackwell Science Ltd, *Journal of Internal Medicine* 247: 395–402

[illegible]

Massey vs. Bellford 68 Ill. 290, was a suit declaring

upon a promissory note, which reads as follows:-"On or by the first of March eighteen and sixty-eight I promise to pay to Jesse Massey \$225.00 with interest from date at the rate of six per cent." "In its decision the court at page 291, among other things said, "In the construction of written contracts it is a well known rule of law that the intention of the parties who make the contract is to be determined from the whole instrument, and when the intent can be so ascertained it is the duty of the court to carry it into effect." On page 292 it further said, "If a contract contains ambiguous words or words of doubtful construction; such are to be construed more strongly against the party who executed the contract. If the contracting party uses, over his own signature, language of doubtful meaning, he cannot complain when the contract is favorable to the other contracting party who is not presumed to have chosen or expressed the doubtful meaning. What then did the defendant intend and did the plaintiff expect when the promissory note was executed in and by which the defendant promised to pay the amount therein named on or by the first day of March eighteen and sixty-eight?" There can be no doubt in regard to the intention of both payor and payee. They undoubtedly intended by the language used to make the note due on the first day of March 1868, the word "hundred" was omitted but the intent of the parties is so manifest that the law will enforce the contract as was intended and hold that the note was due on the first day of March 1868. It is not the policy of courts to give such a construction to contracts as will defeat the ends of justice upon a technical question, but rather to enforce contracts according to the intent of the makers thereof, when, as in this case, the intention is so apparent."

One of the questions presented by the record is as to whether the allegation of damages is sufficient? The declaration alleges the contract and breach thereof by the defendant and the damage thereby suffered by plaintiff. The second count of

[illegible]

the amended declaration avers that the plaintiff has lost great gains and profits that otherwise it could and would have realized on the sale of said oil, and has been otherwise damaged. We are of the opinion that the allegation of damages on general demurrer is sufficient. It is insisted by the defendant that the declaration was demurrable because it failed to allege that the contract had been approved by O. E. Hulse. Each count of the declaration avers that the contract was made and entered into between the parties; the averment includes the doing of each and every act necessary to complete the contract, and it is not necessary to set out the various steps and acts which constitute the execution of the contract. The contract shows on its face that it was approved by O. E. Hulse. Where plaintiff sues on a contract made for his benefit he need not allege an acceptance, since the acceptance will be implied from the act of bringing suit. 13 Corpus Juris page 721 par. 837. It is also insisted by the defendant that each count of the declaration is demurrable in failing to aver any sufficient consideration to support the agreement. The contract sued on contains a promise of the seller to sell, and by the buyer to buy, and the promise of each is the consideration for the promise of the other.

It is also insisted by the defendant that the quantity contracted for is so indefinite as to render the contract unenforceable by reason of specifying the quantity as "approximately 50 to 75 cars, "The word approximately appears to be a part of the printed form of the contract not marked out. The word "approximately" has a definite meaning in law. It means approaching; perhaps, not quite, but not more than specified. Bloomington Canning Co. vs. Union Can Co. 94 Ill App. 62-66. Moreover the word "approximately" in the construction of this contract can be disregarded because the plain intention of the parties as to quantity is that it shall be in not less than fifty nor more than seventy five cars.

[illegible]

After an examination of all questions raised by the defendant, we are of the opinion that the court was in error in sustaining the answer to the declaration, and the judgment of the Circuit Court of Henry County is reversed and the cause is remanded.

Reversed and Remanded.

of which... of all...
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STATE OF ILLINOIS,

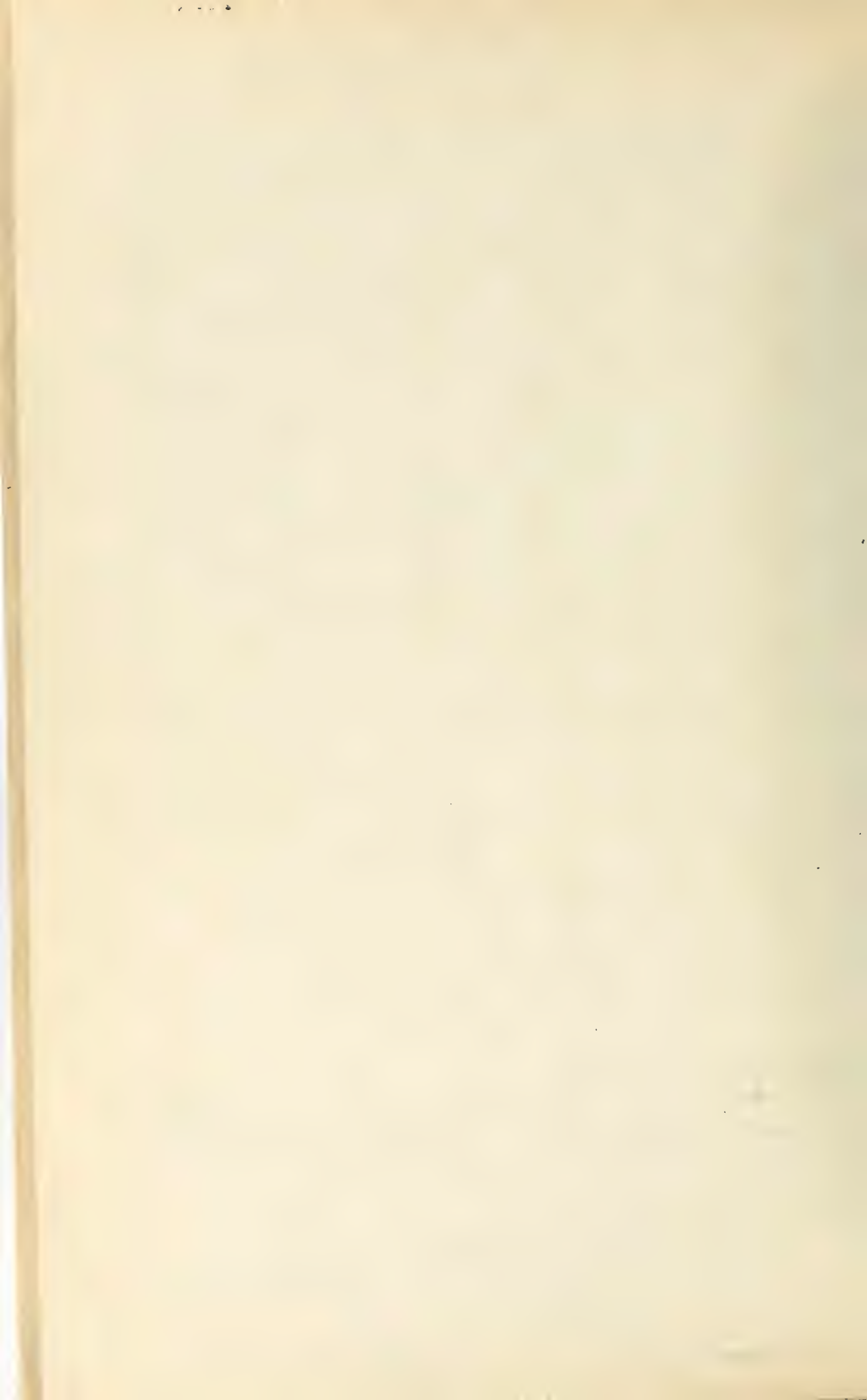
SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court



abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 657²

6864d

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 27 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

BOARD OF EDUCATION DISTRICT :
NUMBER 42, ROCK ISLAND COUNTY, :
STATE OF ILLINOIS, OTHERWISE :
KNOWN AS CORDOVA COMMUNITY :
HIGH SCHOOL DISTRICT NO. 42. :
APPELLANT :
V S. :
NON HIGH SCHOOL DISTRICT OF :
WHITESIDE COUNTY, STATE OF :
ILLINOIS. :
APPELLEE. :
APPEAL FROM CIRCUIT :
COURT OF WHITESIDE :
COUNTY.

Jett. J.

This is a suit in assumpsit instituted by the Board of Education of District Number 42, Rock Island County, State of Illinois, known as Cordova Community High School District, Appellant, against Non High School District of Whiteside County, in said State of Illinois, to recover a balance due for the tuition of three pupils from the non high school district, who attended high school of district 42 of Rock Island County, known as Cordova Community High School, Appellant. The cause was tried before a jury with a finding in favor of the appellee herein. Motion for a new trial was denied and this appeal followed. There are two principal questions presented upon this record for decision.

- FIRST:--- That the Non High School District is neither capable of suing or of being sued.
- SECOND:--- That in determining the per capita cost of maintaining and conducting a high school, all revenue and income must be taken into account.

The first question presented, is that a non high school district is neither capable of suing or being sued, will be given consideration first. There is no express provision of the statute conferring power on non high school districts to sue or be sued. The reported cases involving non high school districts have generally arisen in mandamus proceedings.

Section 23 of the School law, among other things, provides that

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The first condition specified, is that a new firm should be established in order to avoid or limit the risk of being liquidated. There is no express provision in the statute concerning the new firm, but the law is interpreted to mean that the new firm should be established in order to avoid or limit the risk of being liquidated. The proposed new firm should be established in order to avoid or limit the risk of being liquidated.

Supplied to the Department of the Interior, Bureau of Land Management, Washington, D.C.

included in a township high school district, or a community high school district, or a district conducting a maintained four-year high school, shall be organized into a non high school district for the purpose of levying a tax to pay the tuition of all eight grade students residing in such non high school district, including pupils attending a recognized two or three grade high school, organized by local school districts; said district also provides, for a Board of Education consisting of the county superintendent of schools, and shall be an ex-officio member, and of three members to be elected.

Section 24 of the school law provides that the Board of Education of a non high school district, shall have the power, and it shall be its duty, to levy a tax annually upon all the taxable property of such non high school district, for the purpose of paying the tuition of all eight grade students residing within such non high school district, attending one, two, three or four-year recognized high school; that the tuition paid shall in no case exceed the per capita cost of maintenance per pupil actually attended, including interest paid on bonded indebtedness which shall be computed by dividing the total cost of conducting and maintaining such school by the average number of pupils enrolled including the tuition pupils. It will be seen that non high school districts have the power to levy taxes, to enter into contracts concerning matters within the scope of the purposes of such district; to elect officers and to generally exercise all the duties imposed upon them by the Legislature in connection with the efficient system of free schools. The powers granted to and obligations imposed upon non high school districts, are layed out with the characteristics of those which are incident to municipal corporations having the right to tax and to spend. A non high school district has another characteristic of a municipal corporation: it consists of inhabitants and of territory with definite boundaries. It was a corporate unit and governing self. Familiar examples of

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the formation of corporations and quasi-corporations, for the purpose of local administration, are school districts, towns and levee districts. In a strict sense they are not municipal corporations but quasi-corporations.

A mere territorial sub-division, enjoying none of the attributes of a corporation, cannot sue or be sued, except when specially permitted by statute. On the other hand a territorial sub-division, even if not a true municipal corporation, that has power to make contracts, hold property and levy and collect taxes, is so far a quasi-corporation that it may be sued without any express statute giving the action. 12K.C.L. 1049, Sec. 237. The above rule is in harmony with the recent holding of the Supreme Court of this state, with respect to drainage districts. In recent years the court has treated drainage districts as municipal or quasi-municipal corporations, and has sustained verdicts and suits brought directly against levee districts in its corporate name. Bradbury -vs- Vandalia Drainage District 236 Ill.36.

In *McLoud vs. Selby* 10 Connecticut 390, 27 American Decisions 689, one of the questions involved, was whether or not a school district was liable to be sued unless the action was expressly given by Statute. In its decision, the Court said:-
"That these corporations are capable of suing and being sued, would seem to be strongly inferable, from the powers and privileges conferred upon them by the Statute. They have powers to erect school houses, to purchase lands on which to erect them, to levy and collect taxes, to appoint treasurers and collectors and to do all necessary acts for the purpose of sustaining and regulating schools. They may, therefore, possess property, and make contracts. It has however been said that these quasi-corporations are not liable to be sued unless the action is expressly given by Statute, and in support of this proposition a number of cases have been cited. But none of these cases relied on, sustain the proposition in the broad terms in which it has been asserted."

It may be remarked that the only principle involved in these cases is that a quasi-corporation is not liable at common law for the mere neglect of a corporate duty. But it does not therefore follow that no action lies against them unless it be given by Statute. Let it once be admitted (as indeed, it must be admitted,) that these corporations have the power to make contracts, and there is an end of the question. For it surely would be flagrant departure from all principle, to hold that such contracts could not be enforced against them."

In Board of Education of Paris Union School District No. 25, Edgar County, vs. Board of Education of Non High School District of Edgar County, 242 Ill; App. 428, a mandamus proceeding was instituted for the purpose of compelling the non high school board to make a levy in order to collect a tax with which to pay tuition, and a general and special demurrer was interposed to the petition for mandamus, and set up as grounds for demurrer that the non high school district was not such a corporate body as could sue or be sued and that the action would not lie to enforce the payment of the amount due. The trial court overruled the demurrer, and on appeal, the court at page 412 said:- "The appellants, as a Board of Education, and as individuals, constituting that board, do constitute an arm of the state for the purpose of levying taxes, drawing orders for the payment of tuition, and performing other incidental duties, and whether they act as a body corporate or in their individual capacities, as part of the school system of the state, they are equally amenable to the law and the performance of their statutory duty, and such performance may be enforced by mandamus." While it is true that the language used, as above quoted, was in a mandamus proceeding, a non high school district, being amenable to the law in the performance of its statutory duties, such performance may be, in our judgment, enforced either in an action in assumpsit or by mandamus.

[illegible]

If the Board of Education of a non high school

district should refuse to make a levy for the purpose of raising money with which to pay tuition, it could be required to do so by a mandamus proceeding. This would be the enforcement of a statutory duty. If the Board had performed its statutory duty of making the levy, and had collected the taxes for the purpose of paying tuition, and refused to do so, it could, if the contention of appellee is correct, defeat the intent and purpose of the Statute. We think the requirement of the statute to levy and collect a tax for the purpose of paying tuition, carries with it the right to sue for the tuition. In a proceeding as instituted by appellant, the sum could be ascertained and judgment recovered, and if a refusal to pay after judgment, the board could be compelled to pay by an appropriate action.

It is next insisted by appellee that the high school district used the building for community purposes, and rented it out for entertainments, receiving income and profits thereby; that such should be accounted for and the amount of the net profits should be deducted from the total cost of maintaining the high school, so that the actual cost per capita might be ascertained. The statute does not contemplate that the income of a high school district is to be considered in determining the per capita cost of maintaining the school. It matters not how much a high school district may obtain from taxes, gifts, bequests or entertainments; the privilege of non high school pupils to attend the school of a high school district is conditioned upon the payment of the per capita cost, and it makes no difference to such pupils, of other non high school districts, what the source of revenue is which may be used in defraying the total cost of maintaining such high school. If the contention of appellee in this respect is true, then if the high school should take in enough money by entertainment to defray the cost of maintaining the high school, a non high school pupil would be required to pay no tuition at all. A non high school pupil must pay a share of the total costs, without regard to where the money comes from to pay the total cost. Board of Education of

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Paris Union School District No. 95 Edgar County against the Board of Education of Non High School District of Edgar County, 231. Ill. App. 415, was a proceeding in assumpsit for tuition of pupils from non high school territory who had attended the high school in Paris Union School District, and in discussing the question under consideration, at page 421, the court among other things said:- "It is suggested that school districts in many cases, are donees in charitable donations, receiving gifts of money, sites, buildings and equipments, and that under the rule contended for by the appellant, these would operate to the benefit of the non high school district, the same as to the donee intended. If the rule should be established as contended for by appellant, it could be equally as cogently contended that the serving district has misappropriated its funds, entered into improvident contracts, paid exorbitant prices for its sites, building and equipment, and that the cost price of such property was generally grossly unfair and unjust."

We are of the opinion, therefore, that any income received by the appellant district, by way of entertainments, was not a matter proper to be taken into consideration in determining the actual cost per capita of maintaining the school. It is also insisted by appellee that there could be no recovery for the reason that the appellant school district did not prove that its school was entitled to tuition. The record discloses that the witness Earl George testified - "We had a state inspector examine our schools, and the work done there, and they put us on the accredited list, and I understand any pupil leaving our school can attend college from our school, as we are inspected by the state inspector. Said witness also testified, "Our school is an accredited high school, furnishing four year high school." A recognized high school in the meaning of this act is any public high school, providing a course of two or more years of work approved by the Superintendent of Public Instruction. The inference would therefore naturally arise, and the conclusion would be that the appellant has a recognized high school, with four years of credited high school work.

Furthermore, this suit is for a balance claimed by the appellant to be due. The non high school district had made payments on account of the tuition of the three pupils in question who attended high school, and it is estopped now to deny that they were eligible to the high school and that the high school is a recognized high school.

It is the contention of appellant that the court erred in giving instructions 10 and 14 on the part of appellee. Instructions 10 and 14 are as follows:-

(10) The court instructs you that if you believe from the evidence that the plaintiff has received certain income other than taxation and tuition and has failed to prove the amount of such income and that by reason thereof you are not able to determine the net cost of operating the plaintiff's school, then, in such case, the plaintiff cannot recover.

(14) The Court instructs you that the defendant is entitled to the benefit of a credit for any funds received by the plaintiff and if you believe from the evidence, that the plaintiff district has had certain items of income other than taxation, or tuition, and has not given the defendant district the benefit of such credits then, in such case, the plaintiff cannot recover.

These instructions are erroneous as they inform the jury that the net cost is the basis on which to compute the per capita cost, while the net cost is not the correct basis for computing the per capita cost. The net cost is not the total cost, and the total cost is the basis as prescribed by the Statute.

Furthermore, instruction 8, given on the part of appellant, told the jury that they were not to take into consideration any income received by the plaintiff as taxes, tuition, annuities, legacies, bequests, donations, or any income, and instruction 10, given on behalf of defendant, told the jury that the plaintiff could not recover if it had received any income other than taxation and tuition and had failed to prove the amount of such income.

[illegible]

It is the intention of the committee to report that the work of the committee is being completed in the near future.

There is no doubt that the results of the investigation are of great value to the Government and to the public. The results of the investigation are of great value to the Government and to the public. The results of the investigation are of great value to the Government and to the public.

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Instruction 14 told the jury that the defendant is entitled to credit for any funds received by the plaintiff. Instruction 9, given on the part of appellant and instruction 10, given on the part of appellee, are inconsistent. Instruction 8 announces one rule by which the jury shall be governed and 11 announces a contrary rule. The instructions are conflicting as well as contradictory. Conflicting or contradictory instructions furnish no correct guide to the jury, and the giving thereof is erroneous. Illinois Linen Co. vs. Hough 21 Ill. 62; Chicago, etc. Railroad Company vs. Jennings, 114 Ill. App. 622-625. Thomas vs. Riley 114 Ill. App. 520-521. The giving of contradictory instructions is ground for reversal, and for the granting of a new trial. Cummings -vs- Holland 120 Ill. App. 315-318-319; An erroneous instruction is not cured by giving a correct instruction, necessarily inconsistent or contradictory and it is impossible to say which charge the jury followed. Patner vs. Chicago City Railway Company 233 Ill. 163-173-174; Chicago and Milwaukee Electric R. Co. vs. Hawman 206 Ill. 182-184; Where instructions are not consistent with, or contradict each other, it is impossible to say whether the jury was controlled by one or the other, and the giving of instructions which contradict each other, is ground for reversal. Cummings -vs- Holland, 130 Ill. App. 315-318.

We conclude therefore, that in view of the state of the record, reversible error was committed in the trial of this cause and the judgment of the circuit court of Whiteside County will be reversed and the cause remanded, which is accordingly done.

Reversed and remanded.

THE UNIVERSITY OF CHICAGO
CHICAGO, ILLINOIS
JANUARY 1, 1900

DEAR MR. BROWN:

I have just received your letter of the 29th inst. and am glad to hear that you are interested in the work of the University of Chicago. I am sure that you will find the work of the University of Chicago very interesting and valuable.

I am, very respectfully,
Yours truly,
JOHN D. BROWN

JOHN D. BROWN
CHICAGO, ILLINOIS

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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:
Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 657³

BE IT REMEMBERED, that afterwards, to-wit: On

JUL 17 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Received
3-15-28
See letter 3-12-28
modified opinion

| | | |
|------------------------------|---|------------------|
| S. B. GEIGER, APPELLEE, | : | |
| | : | |
| v. | : | APPEAL FROM THE |
| | : | CIRCUIT COURT OF |
| CITY OF ROCKFORD, APPELLANT, | : | WINNEBAGO COUNTY |

OPINION BY BOGGS J:

Appellee instituted a suit in the Circuit Court of Winnebago County, against appellant to recover \$4,915.47, claimed to be due for extra work and materials furnished in the digging of two artesian wells, numbered two and three, under a written contract by which appellee was to sink four deep wells for appellant. The original declaration consisted of one special count, to which the general issue was filed. Appellee later filed the common counts, with a copy of account sued on, together with an affidavit of claim. The plea of the general issue was filed to the common counts. Appellee moved to strike the plea, on the ground that it was not accompanied by an affidavit. On cross-motion of appellant, leave to file an affidavit of merits was given, and the same was filed. The cause was tried and a verdict returned in favor of appellant, on which judgment was rendered. On appeal to this Court the judgment was reversed, and the cause remanded. (Geiger v. City of Rockford, 244 Ill. App. 657; abst. opinion.) A statement of the case appears in our opinion, as filed with the clerk.

When the cause was reinstated in the Circuit Court, leave was given to appellee to amend the ad damnum and the bill of particulars, and to file a new affidavit of claim. Appellant filed three additional pleas, accompanied by an affidavit of defense. To these pleas appellee filed a demurrer, whereupon appellant filed three amended additional pleas, and the demurrer was ordered to be extended to such amended pleas. The trial

court properly sustained the demurrer on the ground that the matters of defense set up in the amended additional pleas could be shown under the plea of the general issue. It was then ordered that the general issue and affidavit of merits filed January 18, 1926, stand to the declaration as amended. Thereupon a motion was made by appellee to strike the affidavit and plea on the ground that under the opinion of this Court, the only triable issue is one of fraud or mistake, and neither of said defenses were put in issue under the plea of general issue or mentioned in the affidavit of defense. The Court allowed the motion, struck the plea and affidavit, and rendered judgment against appellant for \$4,915.47, with interest, etc. To reverse this judgment, an appeal is prosecuted.

Counsel for appellee insist that no defense was available under our holding, except that of fraud or mistake; that no such defense was raised by the plea and affidavit of defense; and therefore the Court did not err in striking the plea.

The order reversing the cause was a general order and when the case was reinstated in the Circuit Court, the parties were entitled to a retrial by a jury. On such trial, the Court would be governed by the legal principles announced in the opinion filed on the first appeal, insofar as those principles were applicable to the case made on the second trial. (South Park Comrs. v. Ayer, 245 Ill. 402; P.C.C. & St. L. R. Co. v. Gage, 286 Ill. 213; Belskis v. Deering Coal Co., 246 id. 62.)

From the statement contained in our former opinion, it will be seen that the depths to which wells numbered two and three were bored are considerably greater than the depths estimated in the contract. The suit is for the work done and materials furnished on such excess depths. The defense set up

100-443887-100

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is a legitimate organization or a subversive one.

There is no doubt that the Government is doing its best to protect the public interest and to maintain the integrity of the judicial system. The Government is committed to the rule of law and to the protection of the rights of all citizens. The Government is also committed to the promotion of the welfare of the people and to the maintenance of the peace and stability of the country. The Government is confident that the public will continue to support the Government in its efforts to protect the public interest and to maintain the integrity of the judicial system.

The above described the names and a general outline of the work done in the various departments of the Government, and which was presented in the following table, the figures were written on a tablet by a juror. On each table, the figures were presented by the local authorities and the figures were presented by the local authorities and the figures were presented by the local authorities.

From the statement obtained in our former report, it will be seen that the region in which we conducted our work was fairly and consistently covered from the beginning to the end of the season. The only exception was the area in which we conducted our work during the latter part of the season.

in defendant's affidavit is, that if any such labor was done or materials furnished in reaching such excess depths, they were furnished at plaintiff's own suggestion and request under a contract for the digging of the wells at an agreed price per foot, which price had been fully paid; and that there were no extras contracted for incident to the digging of the wells or otherwise. We were of the opinion when the case was first before us that the affidavit of defense was a sufficient one and we still adhere to that view.

On the first trial the defendant sought to show (a) that the work and material were to be classed as "extras", and under the contract, no recovery could be had, unless they were ordered in writing by the consulting engineer and endorsed by the Superintendent of the Water Department, with the agreed price for the same specified in the order; (b) that they were not so ordered and no agreed price had been specified there^{for}, (c) that under the contract the plaintiff was bound to furnish the additional work and material without additional compensation there-
for; (d) that the engineer's final estimate was not binding upon the defendant city; and (e) that all the work had been fully paid for.

We held that the work and material for which the suit was brought were furnished under the contract, and contemplated by it, and were not to be classed as "extras"; that the contract specifically provided for the payment for such additional work; and that the final estimate of the engineer was binding upon both plaintiff and defendant in the absence of fraud or mistake.

For the errors pointed out in our former opinion, the cause was reversed and remanded generally. When next put upon trial, and after the demurrer had been sustained to the amended additional pleas, the pleadings and issues were the same as they were on the first trial. The defendant, under the plea and the affidavit of defense, had a right to show, if it could, that the additional work and materials had been fully paid for. That was

in defendant's affidavit is, that if any such paper was sent to
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document for the filing of the writ of habeas corpus. This was
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and no other papers were then.

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the defendant; and (d) that all the writ was then fully said.

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the only question raised by the pleadings. Whether the city had paid for such excess depths is a question of fact.

Under our view of the contract and the pleadings, the situation is simply this: It is conceded that the plaintiff furnished the work and material for the additional depths, claimed by him, but the affidavit asserts that additional compensation therefor has been paid. If plaintiff was paid additional compensation therefor, he cannot recover. If he was not paid additional compensation, as we have held the contract contemplates, then he is entitled to recover. This question should have been presented to the jury and it was error for the trial Court to strike the affidavit of defense and plea of the general issue and to render judgment as by default. The cause must be again reversed and remanded for a new trial in conformity with the views herein expressed.

Reversed and remanded.

Addenda:

In a petition for rehearing, counsel for plaintiff insist that the suit is on an award made by the engineer under the terms of the contract; that the award can be impeached only for fraud or mistake; and since there was no appropriate plea on file under which such a defense could be shown, the court properly struck the plea and affidavit. Counsel's contention that the suit is on an award is one only recently taken. What the theory was, when the case was first presented to us, is disclosed by the original brief. As there expressed, it was that the suit was for "extras" contracted for and agreed upon at a certain conference held between the plaintiff and the mayor and other representatives of the City. The defendant by its affidavit of defense denied that the work was to be classified as "extras" and averred there were no "extras", and that the work done was under the terms of the contract and contemplated by it. The affidavit also stated that whatever work was so done had been fully paid for.

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In our first opinion, we interpreted the contract and held that the additional drilling would not be classified as "extras" and that the plaintiff was entitled to recover for it according to the report of the Engineer, unless it had been paid for. The cause was reversed and remanded generally. There was no pleading on the part of the defendant setting up fraud or mistake. The law of the case has been settled by our original opinion. The only fact in issue was whether or not the work had been paid for. There was no contention that the suit was upon an award.

Subdivisions III and IV of plaintiff's brief further evidence the original theory of counsel. They are as follows:

III

"The extra work and material being outside the contract and not specified in it, the plaintiff can recover the value thereof as fixed by the evidence."

IV

"A written order for the extra work and material was not necessary as the same was performed and accepted at the request of the defendant's lawful agents."

Subdivision V is entitled "Decision of Engineer was Binding". However in the argument of that topic, it is not claimed that the Engineer's finding (^{Pl} ~~Plaintiff's~~ exhibit 4) was furnished in connection with work contemplated and actually done under the original contract, but it is insisted that it was in connection with "extras" which had been decided upon in the conference.

We held that plaintiff's counsel had placed an erroneous interpretation upon the terms of the contract; that the additional work was called for by the contract and contemplated by it; that there was no novation of the contract at the conference; and that the report of the Engineer was binding in the absence of fraud or mistake.

Although the original theory of the case, as adopted by plaintiff's counsel was erroneous, still, there was no

variance between the pleadings and the proof, and therefore, there was no obstacle to a recovery, if extra compensation had not already been paid him by the city.

and not directly from the State.

STATE OF ILLINOIS, .

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 14th day of
March in the year of our Lord one thousand
nine hundred and twenty nine

Justus L. Johnson
Clerk of the Appellate Court

Plaintiff

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 6574

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 8 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

| | | |
|------------------------------------|---|------------------|
| NUNZIO di LORENZO, Appellee, | : | |
| | : | |
| v. | : | Appeal from the |
| | : | Circuit Court of |
| THE TEXAS COMPANY, a Corporation : | : | Will County. |
| Appellant. | : | |

JONES P.J.

This is an appeal from an interlocutory order denying a motion to dissolve a temporary injunction theretofore granted on a bill in chancery filed by complainant.

The bill alleges that complainant is the owner of certain premises in the city of Joliet, which he leased to Sam Criscione for one year, from February 15, 1926 for \$1200 with a privilege of renewal for four years; that the lease provided that Criscione might sublet the premises to the defendant company, only; that at the time said lease was executed, Criscione, with the knowledge and consent of complainant, sublet the premises to the defendant, The Texas Company, for \$50 per month for one year with a renewal privilege; that the complainant and Criscione, on September 1, 1926, terminated the lease by mutual agreement; that complainant then executed a new lease to Charles di Lorenzo, his son, for \$1200 a year; that on September 18, 1926, Charles entered into an agreement with the Roxana Petroleum Company for the sale of its products on said premises, and removed the equipment of The Texas Company, and installed the equipment of The Roxana Company; that thereafter defendant instituted a suit against Charles and obtained a judgment of forcible entry and detainer against him.

The bill further alleges that defendant pretends to have a written instrument signed by complainant whereby the defendant became a sub-lessee of complainant upon the termination of the lease to Criscione, at a rental of \$50 per month;

and is therefore entitled to possession under it; that the defendant threatens to repossess itself of the premises and complainant believes it will forcibly do so by execution of legal process, and thereby inflict upon complainant an irreparable injury unless restrained by injunction; that complainant has no knowledge of any such instrument in writing and denies its existence unless it was procured by fraud and deceit, and, if in existence it is inaccessible to complainant and its terms are unknown to him.

The prayer of the bill is for discovery and for the setting aside of the said pretended sub-lease, and for an injunction restraining the defendant from all legal proceedings to repossess said premises.

Defendant's verified answer alleges that complainant recognized and accepted the defendant as a sub-lessee, and that the lease between complainant and Criscione, and also the sub-lease of Criscione to defendant, which was acknowledged before complainant as a notary public, are in full force. It denies that complainant had a right to rescind the lease to Criscione without the knowledge or consent of defendant, and denies that it was terminated. It alleges that any such termination would not effect the rights of defendant for the reason that shortly after the sub-lease to defendant was executed, the complainant covenanted in writing by a "rider" on the sub-lease that if Criscione's lease should be terminated at any time before its expiration, complainant would permit defendant to continue in possession, as tenant, under the conditions and covenants contained in the sub-lease. It denies that the instrument was procured by fraud, and alleges that the complainant was fully advised of its terms and executed it before a Notary Public. It further alleges that the sub-lease was entered into with complainant's knowledge and consent and contained a provision for the extension thereof for an additional four years' term upon notice to Criscione; that such notice was given to Criscione

and to complainant and his tenant; that after the defendant obtained a judgment for possession, as alleged in the bill, an appeal was perfected to the circuit court; that the complainant signed the appeal bond as surety for his son; that the appeal was subsequently dismissed for want of prosecution; that a procedendo was thereupon issued and that the defendant's only efforts to obtain possession have been under the writ of restitution. The answer further alleges that defendant's equipment was surreptitiously and forcibly moved from the premises and the pump and equipment of the Roxana Company installed in their place without defendant's knowledge or consent.

No replication was filed and defendant moved to dissolve the injunction for want of equity and because the bill was fully answered. The cause upon the motion was submitted upon bill and answer and the court took it under advisement. Thereafter a verified amendment to the answer was filed. Upon consideration the court denied the motion to dissolve the temporary writ of injunction.

It is asserted that the bill is insufficient, because it contains no allegation of fact showing irreparable injury, and further, there is no allegation to show fraud and deceit on the part of the defendant. It is well settled that a general allegation of irreparable injury is not sufficient, but the facts and circumstances relied on to show it must be alleged. (Abel v. Flesher 296 Ill. 604; Kroschel v. Schwall 307 id. 530.) The rule is equally well established that the facts and circumstances which constitute fraud should be set out clearly and concisely, and with sufficient particularity to apprise the opposite party of what he is called upon to answer. (Bouxsein v. Granville National Bank 292 Ill. 500.) No fact or circumstance tending to show irreparable injury or to show fraud and deceit is alleged in the bill.

and to emphasize and his point; that after the hearing of-
tained a judgment for possession, he alleged in the Bill, as
appeal was referred to the circuit court; that the defendant
and alleged the appeal was as stated; that the Bill and the
appeal was subsequently decided for want of necessity;
that a proceeding was thereupon issued and that the defendant's
only efforts to obtain possession have been since the date of
vestigation. The answer further alleges that defendant's
allegation was substantiated and lawfully made; that the
premises and the pump and equipment of the Texas Company
installed in their place without defendant's knowledge or
consent.

The allegation was filed and defendant moved to
dissolve the injunction for want of equity and to remove the
Bill and fully answered. The court upon the motion was con-
vinced upon Bill and answer and the court took it under a
review. Thereafter a verified complaint to a circuit
was filed. Upon consideration the court issued the writ
to dissolve and temporary writ of injunction.

It is suggested that the Bill is insufficient, for-
cause it contains no allegations of fact showing defendant's
guilt, and further, there is no allegation of how Texas
based on the fact of the defendant, it is well known that
a general allegation of trespass is not sufficient,
but the facts and circumstances relied on as true is that
he alleged. (Hess v. Texas Oil Co., 100 Tex. 100, 101 S.W. 2d 100.)
The rule is equally well established that
statements and circumstances which are not
and are clearly and convincingly, and also sufficient
tendency to establish the specific facts of which he is
upon the answer. (Hess v. Texas Oil Co., 100 Tex. 100, 101 S.W. 2d 100.)
The fact of defendant's motion to show trespass
is not as to show Texas and based is alleged in the Bill.

The charges by general allegation are mere conclusions of the pleader.

Complainant urges that objections for informality and insufficiency can be raised only by demurrer, and that by filing an answer, all such defects were waived. Where the motion to dissolve the injunction is based on a want of equity apparent on the face of the bill, the motion has the same effect as a demurrer. For the purpose of testing the sufficiency of the bill, the facts stated in it are to be taken as true. Conclusions of the pleader are not admitted by the motion, but only the facts which are well pleaded. (White v. Y.M.C.A. 233 Ill. 526.) A motion to dissolve an injunction may be made at any time after answer for want of equity on the face of the bill. (Revised Statutes 1927 Sec. 15, Chap. 14.)

The motion to dissolve the injunction having been submitted on bill and answer, without replication, the answer must be taken as true upon the hearing. (Farrell v. McKee 36 Ill. 226; Kingman & Co. v. Mowry 182 Id. 256.) The answer alleges and the "rider" provides that the defendant might continue in possession of the premises as a tenant of complainant, if the Criscione lease should be terminated before its expiration. Therefore, as a matter of law, neither the alleged termination of Criscione's lease nor a subsequent lease to complainant's son could effect the rights of the defendant under the "rider".

That the complainant was not a party to the forcible entry and detainer suit is of no consequence. He is here seeking the aid of a court of equity. By this record he is obligated to perform his covenant to allow defendant to continue in possession of the premises as his tenant under the terms of his agreement. The fact that he was not a party to the forcible entry and detainer proceeding does not in any way relieve him from the force of his obligation or tend to establish any equity in his favor.

[illegible]

The answer is a complete refutation of the charges in the bill and it was error to deny defendant's motion to dissolve the injunction. The order denying the motion is reversed and the cause remanded with directions to enter an order dissolving the injunction.

Reversed and remanded with directions.

The answer is a complete refutation of the theory in
the Bill and it was given to the Committee's order to instruct
the Committee. The report is in the Bill in the order and
the report is in the Bill in the order and the report is in the
Bill in the order and the report is in the Bill in the order.

Approved and forwarded - 11/11/1911.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

Index
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 657⁵

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 8 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

| | | |
|--|---|------------------|
| PEOPLE OF THE STATE OF ILLINOIS, | : | |
| Defendant in Error, | : | |
| | : | |
| v. | : | WIT IN ERROR TO |
| | : | THE COUNTY COURT |
| JOHN DOE, otherwise known as I. G. Lain, | : | OF LAKE COUNTY, |
| Plaintiff in Error. | : | ILLINOIS. |

JAMES F.J.

An information was filed under Section 82 of the Election Law (Sec. 82, Chap. 46 Revised Statutes) charging defendant with wilfully aiding and abetting certain persons who were not legally qualified voters to vote at an election. Subsequently an amended information consisting of five counts was filed. The first three counts charged defendant with illegal voting. The fourth count charged him with aiding and abetting seven named persons to illegally vote at a certain election. The fifth count charged him with aiding and abetting the same seven men and other persons, whose names were unknown to informant, to illegally vote at such election.

The information and the amended information were verified by the affidavit of the state's attorney. An oral motion to quash the amended information was overruled. Thereafter in compliance with an order of the court, the state's attorney filed a bill of particulars under the fifth count furnishing additional names which did not appear in any of the counts. All of the names so furnished, except that of Fred Tomei, were endorsed as witnesses on the amended information when the same was filed. A nolle prosequi was entered as to the first and second counts of the amended information and the case was submitted to the jury on the remaining counts. At the conclusion of the evidence the defendant made a motion to require the prosecution to elect on which of counts 4 and 5 it would rely for a conviction. The motion was denied. The jury returned a

[illegible]

verdict finding defendant guilty under the 4th and 5th counts.

A motion for a new trial was allowed as to the fourth count and thereupon the state's attorney entered a nolle prosequi as to that count. Judgment was entered on the fifth count sentencing the defendant to the county jail for 30 days and to pay a fine of \$200 and costs.

It is insisted by defendant that the 4th and 5th counts of the information are bad for duplicity, in that more than one offense is charged in each count. The statute provides "Whoever wilfully aids and abets any one not legally qualified to vote at an election in voting or attempting to vote at such election * * * * shall on conviction, etc." (Section 88, Chapter 46, Revised Statutes). It is claimed that by the use of the words "any one", the statute makes the offense a separate, distinct and substantive crime as to each person aided or abetted in voting illegally. It is a primary rule in the interpretation and construction of a statute that the intention of the legislature is to be ascertained and given effect. In ascertaining the legislative intent each part or section is to be considered in connection with every other part or section, also the evils intended to be remedied by the enactment. (The People v. Price, 257 Ill. 587). It was the object and intent of the legislature in enacting the section in question to maintain the integrity of the ballot. Punishment for aiding or abetting illegal voting is provided for the obvious purpose that an election may express the will of the qualified voters. It is true that only one act may be sufficient to charge a violation of the statute, but if the pleader sees fit to charge a number of acts, all of which when considered together constitute the offense, we do not regard such an allegation as double. (Wzzell v. People 173 Ill. App. 257.) An indictment is not double because it charges several related acts all of which enter into and constitute a single offense, although such acts may in themselves constitute single offenses. (People v. Speedy 198 Ill. App.

427). Each count in the information charges the offense was committed at an election held on a certain day, and there is nothing to indicate that the several acts were committed at different times or were separate and distinct offenses. To be duplicitous there must be joined in the same count different, separate and distinct crimes committed at different times. (Waters v. People 104 Ill. 544.) In our opinion neither of the counts complained of was bad for duplicity.

It is claimed that the case under the 5th count should not have been submitted to the jury because the state's attorney knew, or by reasonable diligence could have known the names of the persons whose identity was therein stated to be unknown. The mere fact that such names were endorsed as witnesses on the information, does not tend to establish defendant's contention. We think the court committed no error in this behalf.

One of the parties named in the bill of particulars made a written statement in the office of the state's attorney previous to the filing of the information setting forth his knowledge of what occurred on election day. His name was endorsed on the information. It does not appear that he furnished the state's attorney with any of the other names mentioned in the bill of particulars, and it is not shown that the state's attorney knew their names at the time he filed the information.

It is claimed that the bill of particulars should have been verified. The information and not the bill of particulars is the charge upon which the defendant is tried. The object of a bill of particulars is not to make a substantive charge against the defendant, but to limit the evidence which may be introduced under the information as to the particular transaction. We are of the opinion that the fifth count was properly submitted to the jury.

The amended information with the affidavit of the state's attorney attached was taken by the jury to their room,

when they retired to consider of their verdict. The affidavit attached to an information is not to be treated as any part thereof. (People v. Clark 280 Ill. 160.) Trials for criminal offenses are to be conducted according to the course of the common law, except as otherwise provided by law. (Crim. Code, Para. 761, Chap. 38.) The common law rule in criminal cases was that the jury, when they retired to deliberate on their verdict, should take with them such books and papers as had been produced in evidence and as the judge should direct. (Dunn v. People 172 Ill. 582.) No change of the common law rule is in effect in this state. The affidavit was not a part of the evidence, and it is difficult to tell what weight may have been attached to it by the jury. The record fails to show that the defendant objected to the information and exhibits in the case going to the jury, but we are of the opinion that it is not proper for such an affidavit to be submitted to the jury.

The seventh instruction, offered on behalf of defendant, and refused by the court, was to the effect that the information was a mere formal charge and constitutes no evidence of the defendant's guilt. The instruction was written is somewhat argumentative, but it stated a correct principle of law, which was not covered by any other given instruction. It embraced a matter on which the defendant had a right to have the jury instructed, and it was error to refuse it. (People v. Waruda 314 Ill. 536.)

The court permitted the State's attorney to cross examine some of People's witnesses. The rule is that when a witness unexpectedly gives testimony against the party calling him, such party has the right to examine him and by such examination show that the witness is giving unexpected testimony against the party examining him, and to specifically call the attention of the witness to his former statements for the purpose of refreshing his memory and of awakening his conscience. If,

However, the witness denies the alleged statements, the party calling him must be concluded by his answers, and cannot show either by the written statement of the witness or by other witnesses, that the witness did in fact make those statements. (People v. O'Gara 271 Ill. 138.)

During the selection of a portion of the jury, and also during the argument by the prosecution, the trial judge left the courtroom and went into an adjoining room, closing the door between the rooms. No objection was made by the defendant on either occasion to the judge's departure, or to anything which occurred during his absence. While the judge was thus absent, the state's attorney in the course of his argument, pointed his finger in the direction where defendant and others were sitting, and stated that two witnesses in the case had been punished for illegal voting, and now it was time to punish the men who were responsible for it. The remark of the state's attorney was improper and prejudicial. The absence of the judge from the courtroom during the trial was error. (Merileth v. People 84 Ill. 479; Thompson v. People 144 id. 378; People v. Chrfrikes, 295 id. 222; Loftus v. Chicago Ry. Co. 293 id. 473.)

The court did not err in allowing the state's attorney to nolle the fourth count. The rule that a nolle prosequi cannot be entered without the consent of the defendant after a jury has been impanelled and sworn because the defendant has the right to a verdict which will be a bar to another prosecution, has no application after verdict rendered, and a new trial awarded. The defendant was not injured but benefited thereby. (People v. Brown 273 Ill. 169; People v. Williams, 309 id. 492.)

It is unnecessary to discuss other assignments of error, which under the present state of the record, will not occur on a retrial. On account of the errors above mentioned, the judgment must be reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

Abstract
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 6581

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 8 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



| | | |
|---------------------------------|---|------------------|
| FARMERS' STATE BANK OF BURGESS, | : | |
| a corporation, | : | |
| Appellee, | : | |
| | : | |
| v. | : | Appeal from |
| | : | Circuit Court of |
| THOMPSON BRADFORD, et al, | : | Merger County. |
| H. L. HOWARD, Trustee, | : | |
| Appellant, | : | |

JONES P.J.

The Farmers' State Bank of Burgess filed its bill to foreclose a real estate mortgage and to set aside a purported release of said mortgage. On January 13, 1924, Thompson Bradford, and his wife, and their son-in-law, Wilmer J. Peters, and his wife, executed to complainant bank their two promissory notes for the sum of \$6500, due six months thereafter. Bradford and wife, on May 5, 1924, gave a mortgage on certain real estate owned by them to Peters and wife.

It is the contention of the complainant that this mortgage was taken by Peters and wife, in trust, to secure said indebtedness to the bank. The defendants, however, claim that the mortgage was not given to secure the indebtedness to the bank but was a private arrangement between the parties to protect the Bradfords, in certain contingencies. The evidence shows that it was delivered to the bank, and retained by it. Among the provisions of the mortgage was one that the indebtedness to the bank might be extended to and including January 13, 1926. On September 9, 1924, Bradford and wife and Peters and wife paid the accrued interest on the notes and renewed them for a period of six months.

The premises mortgaged were subject to three prior mortgages, one for \$10,000 to the Savings Bank of Kewanee, one to John Fischer, Trustee, for \$3,000 and the third to the People's National Bank of Rock Island for \$8,000, upon which \$6,000 had been paid. On September 23, 1924, Bradford and wife conveyed the premises in question to Peters and wife and on January 9,

1925, Peters and wife conveyed it to H. L. Howard, trustee. On January 10, 1925, Peters and wife executed the instrument purporting to release the mortgage given them by the Bradfords. It is this instrument which the complainant seeks to have declared invalid and cancelled of record.

The answer of H. L. Howard alleged that in accepting the deed for said premises, he relied in good faith upon the record of the release, and denied that his deed is subject to the lien of said mortgage. Bradford and wife, and Peters and wife filed an answer in which they alleged that the indebtedness to the complainant bank was owed by Peters and wife and that Bradford and wife had signed the notes to the bank only as sureties; that the mortgage made by them to Peters and wife was not to secure the indebtedness of Peters and wife to the bank, but was given so that the Bradfords could have it released whenever they desired to avail themselves of their equity in the premises by a sale thereof or otherwise. The answer admitted that it was agreed and set out in the mortgage that the indebtedness to the complainant might be extended down to and including January 13, 1926 and that said notes for \$6500 were renewed on September 9, 1924, and all accrued interest was paid up to that time.

C. H. Greenwood, cashier of complainant bank when the mortgage in question was made, testified that Mrs. Bradford came into the bank and talked to him about her son, Guy Bradford, who was in financial difficulties and that she said they were going to do all they could to help Guy, but feared some of his creditors would take out the rest of what they had in the place; she touched upon their good standing in the community and stated that since they had signed the \$6500 notes, she wanted to make the bank safe; that she did not want some other creditor to come in and get what was left without giving the bank a chance; that she suggested the making of the mortgage to Peters and wife,

1934, 1935 and 1936, and it is M. L. Howard, Treasurer. On
January 17, 1937, Howard and wife attended the last meeting
before the release of the prisoners, given for the prisoners.
It is this last meeting which the confidential source is referring
to. Howard and wife attended the meeting of January 17, 1937.
The names of M. L. Howard and wife are in the
the fact that they were present, as stated in the report given the
Treasurer of the release, and stated that the fact is correct.
to the fact that they were present. Howard and wife, and Howard
and wife filed an answer in which they alleged that the fact
alleged by the confidential source was not in fact true and wife
and that Howard and wife did attend the meeting on the same
trip as Howard; that the confidential source is wrong in stating
that wife was not to receive the release of Howard and
wife in the same, but was given to her the release until
date it was given. Howard and wife stated in their answer of
facts solely in the question of a wife answer to Howard.
The source stated that it was Howard and wife in the
meeting and the information to the confidential source.
The confidential source is not correct. January 17, 1937 and
that said date the 1937 were received on January 17, 1937.
and all answers received are said to be true.
M. L. Howard, Treasurer of confidential source.
The confidential source is correct and says, January 17, 1937.
Howard and wife were not given to him after the fact, but
Howard, who was in financial difficulties and that the
said fact was given to all that would be said to be true.
as one of his creditors would have out the rest of what they had
in the fact; the source upon their fact stating in the confidential
and stated that since they had signed the 1937 release, they would be
given the fact that they did not want to be released to
them in all fact was left without giving the fact a release;
that the confidential source of the source to Howard and wife.

and putting in the mortgage that it was to secure the \$6500 debt to the bank; and that she wanted to give the mortgage in such a way as to secure the bank.

Mrs. Bradford testified that they owned 100 acres of land, valued at \$275 an acre, which was encumbered to the extent of \$21,000, leaving an equity of \$6500; that the mortgage was made to Peters and wife to protect their equity and with the idea that they could procure its release and discharge whenever necessary, and that the indebtedness to the bank had nothing to do with it. She further testified that Greenwood suggested making the mortgage direct to the bank, but that she refused to do it. On cross examination she admitted that she did not know whether she told Greenwood she wanted to protect their equity to the extent of \$6500 for their own benefit, or whether she mentioned securing the bank for the indebtedness they owed it. She admitted, however, that Greenwood wanted the bank's indebtedness mentioned in the mortgage and that she consented to it. She testified that the matter had been discussed at home between her and her husband and Peters and wife, and that the mortgage was made with the view of protecting their equity and controlling the release of it.

Wilmer J. Peters testified that it was his understanding that the bank had never had any direct interest in the mortgage, but he admitted that in the conversation to which Mrs. Bradford testified, the securing of the debt to the bank was discussed in a way, and that the conversation was to the effect that in case something should happen to Mr. and Mrs. Bradford, the bank would have the \$6500 mortgage as a lien on the property and if there was anything left after the place was sold and the prior mortgages paid, the residue could be applied on the debt to the bank.

The record discloses that at the time the mortgage was made, the Bradfords considered their equity in the land worth

more than \$6500, and shortly before that time, they made a statement to complainant bank that they valued the land at \$30,000.

The Fidelity & Casualty Company, acting through the appellant, Howard, had agreed to pay an indebtedness of \$12,500, for which Guy Bradford was liable. In consideration of such payment, Thompson Bradford and his wife agreed to convey their equity in the land in question to Howard as trustee for The Fidelity & Casualty Company. He had agreed to accept it at a value of \$10,000 and to take a promissory note for the balance of \$2500. For the purpose of consummating the transaction, Howard, who was a resident of Chicago, instructed his local attorney at Rock Island, that if the records of Mercer County disclosed no liens other than the \$15,000 encumbrances above mentioned, to obtain a deed for the Bradford equity and also a note for \$2500, and to pay the \$12,500 indebtedness of Guy Bradford.

Appellant's attorney, Mr. Edward W. Schoede testified that he obtained the assistance of a young man connected with an Abstract Company and was furnished with a list showing all of the mortgages above mentioned and also the deed from the Bradfords to Peters and wife. When Mr. Schoede was informed of the existence of the \$6500 mortgage and of the deed of Peters, he inquired of Bradford or Peters about them while they were all together and told them he had known nothing of the mortgage. He was then informed it was just a family affair; that the title had been put in Peters to protect the parents against any judgment; that Peters held the mortgage of \$6500 merely to protect the Bradfords' equity in the premises; and that they had come there for the purpose of releasing the mortgage.

100,000

of my finding.

also a note for \$2000, and at the \$1,200 interest

above mentioned, to obtain a check for the interest upon the

County disclosed no item other than the \$1,200 interest

payment of that island, and at the month of January

Thomas, who was a resident of Chicago, indicated his belief

of \$200. The two parties of \$2000 and \$1,200 interest

a value of \$2,000 and to have a receipt for the interest

Wheeler & Company Chicago. He was asked to show it as

easily in the bank in receipt of Thomas as he was the

with payment, Thomas smiling and he was asked to show them

the, but they would not allow me to see it. In conversation of

the day, and Thomas, had asked to see the receipt of

The Chicago & Central Chicago, and the Chicago

[illegible]

Mr. Schoede prepared and filed a release of the mortgage and also a deed from them to appellant, Howard, as trustee. He then paid the \$12,500. He testified that he did not personally examine the mortgage; that he relied upon the information that was given him by the abstractor; that he never knew the mortgage recited that it was given to secure the note held by complainant bank, and that Howard left the entire matter to him and therefore knew nothing about that particular matter.

We are of the opinion from the evidence that the mortgage in question was given to secure the said indebtedness of Wilmer J. Peters and Mary Bradford Peters to the bank, and that the mortgage stood as a security for the notes in question. We are also of the opinion that the recitals of said mortgage, together with the surrounding circumstances, were sufficient to put appellant, Howard, on inquiry to ascertain whether or not the release of said mortgage executed by Peters and wife was made with authority. We hold that the mortgage was constructive notice to Howard and to everybody else of the rights of appellee bank thereunder. Public records, by construction of law, are notice to all persons of what they contain. Their contents are matters of public knowledge, because the law requires them to be kept, and authorizes them to be used. The record of a duly executed mortgage is constructive notice to all subsequent purchasers and encumbrancers. (Hagan v. Varney 147 Ill. 281; 19 R.C.L. Mortgages Sec. 203.) The mortgage in question shows that it was executed to Peters and wife in the nature of a trust for the benefit of appellee bank. No particular form of words is necessary to create a trust. (Hagan v. Varney, supra.) A purchaser or transferee of trust property, which is disposed of by the trustee in violation of his trust, is not a bona fide purchaser of such property, if, at the time of his purchase, he is chargeable with constructive notice of the trust; and he is charge-

... proposed and filed a notice of the mortgage
and also a deed from him to appellant, Howard, as
trustee. He then paid the \$12,500. He testified that he did
not personally examine the mortgage; that he relied upon the
information that was given him by the attorney; that he
never knew the mortgage recited that it was given in exchange
for the note held by complainant bank, and that Howard told him
nothing to him and therefore knew nothing about such
particular matter.

He was of the opinion from the evidence that the
mortgage in question was given to secure the said indebtedness
of William J. Peters and Mary Elizabeth Peters to the bank, and
that the mortgage stood as a security for the note in question.
He was also of the opinion that the recitals in said mortgage,
together with the surrounding circumstances, were sufficient
to put appellant, Howard, on inquiry to ascertain whether or not
the release of said mortgage executed by Peters and wife was
made with authority. He held that the mortgage was constructive
notice to Howard and to everybody else of the rights of
appellant bank thereunder. Public records, by examination
of law, are notice to all persons of what they contain.
Their contents are matters of public knowledge, because the
law requires them to be kept, and notices need to be kept.
The record of a duly executed mortgage is constructive notice
to all subsequent purchasers and encumbrancers. (Harris v.
Kearney 147 Ill. 381; 19 R.U.L. Reporter 302, 123.) The
recitals in question show that it was executed as follows
and also in the nature of a trust for the benefit of appellant
bank. No particular form of words is necessary to create a
trust. (Harris v. Kearney, supra.) A purchaser or encumbrancer
of trust property, which is disposed of by the trustee in
violation of a trust, is not a bona fide purchaser of
trust property, if, at the time of his purchase, he is charge-

able with notice of the trust and of the trustee's breach, where the facts and circumstances existing at the time of the purchase, within his knowledge, are such as would or ought to put a man of ordinary prudence upon inquiry and require him to make an investigation, as the result of which the true title and authority of the trustee would be disclosed, and he fails to make such an investigation, as where he has notice that the *castui que* trust or a third person is claiming an interest in the property. (39 Cyc. Trusts 562.)

A purchaser of trust property is chargeable with constructive notice of the trust where facts giving rise to such notice are a matter of record, as where the instruments creating or giving rise to the trust are duly recorded and disclose such facts and circumstances ~~as are~~ sufficient to put him on inquiry. (Hagan v. Varney, *supra*; 39 Cyc. 567.)

The notice necessary to put a party on inquiry need not furnish full, complete and accurate information of the nature, extent and particulars of the encumbrance. On the contrary, where a person contemplates the purchase of property, and is informed that a particular person claims title, or to hold an encumbrance, such information has been held to charge him with notice of the nature and extent of the claim. It pointed out the source from which accurate information could be obtained. In fact, the rule is, that if anything apprises a purchaser or encumbrancer that a particular person claims the property, or an interest in it, the former must pursue that notice to its source, and failing to do so, he will be charged with all he would have learned had he pursued and investigated the matter to the full extent to which it led. (Crawford v. C.B. & Q. R.R. Co. 112 Ill. 314; Mills v. Strawn 206 Ill. App. 107.)

It is also to be observed that the notes and the mortgage in question were at the time of the purported release in the possession of appellee bank. Where a trustee enters satisfaction of a trust deed duly recorded in consequence of a

with notice of the fact that the trustee's power, under the facts and circumstances existing at the time of the payment, within his knowledge, was such as to lead him to believe that of ordinary prudence upon having and retaining the same as an investment, as the result of which the trust fund and the property of the trustee would be diminished, and he failed to make such an investigation, and where he had notice that the trustee was not a third person in relation to the property.

(39 Cyc. Tracts 442.)

A purchaser of trust property is bound to inquire with due investigative notice of the trust estate, and also to make notice a matter of record, and where the facts existing or giving rise to the trust are not known and disclosed, such facts and circumstances should be made known to the trustee. (Hazen v. Hazen, 33 Cal. 2d 107.)

The notice necessary to put a trust in relation to the trust fund, complete and proper knowledge of the nature, extent and perfection of the trust. In the absence of a person contemplating the purchase of property, and in relation to a particular person claiming title, or to hold an interest, such information has been held to charge him with notice of the nature and extent of the claim. It follows that the trustee, which contains information could be withheld. In fact, the trustee is, that it requires a purchaser to make inquiry that a particular person claims the property, or an interest in it, the former must purchase that notice in the absence, and failing to do so, he will be charged with all the facts known to the trustee and investigated the matter in the fact learned had he purchased and investigated the matter in the fact to which it led. (Hazen v. Hazen, 33 Cal. 2d 107.)

III. 311; Hazen v. Hazen, 33 Cal. 2d 107.)

It is also to be noted that the trustee is not bound to make inquiry at the time of the payment of the purchase price of the property. Where a trustee is

negotiation for the purchase of the land and for the purpose of consummating the sale, and accepts payment of the amount of the debt secured from such purchaser without producing and cancelling the note and without authority from the holder thereof, the purchaser cannot be said to have purchased without notice of the rights of the holder of the note. (Stiger v. Bent 111 Ill. 328; Fortune v. Stockton 182 id. 454; 19 R.C.L. Mortgages Sec. 239; 41 C. J. Mortgages 590.)

Reliance upon information obtained from an abstract which does not show the true state of the record is not a sufficient excuse to the purchaser for failure to examine the record. (Hagan v. Varney, supra.)

Under the facts shown by the record, the chancellor properly held that appellant, Howard, took the title to the premises in question subject to the rights of appellee bank under the mortgage to Peters and wife and that the release of said mortgage by Peters and wife was ineffective as to said bank.

On the cross error assigned by appellee bank, we are of the opinion that the record is sufficient to sustain the holding of the chancellor that the indebtedness to said bank should be credited with \$1800, covered by a receipt given by appellee bank to Peters, on account of a certain mortgage given by Peters and wife to the Bradfords and afterwards assigned to the bank. The explanation made with reference to the giving of this receipt by appellee's cashier is sufficient to show the consideration ~~for~~ the execution of the receipt. At any rate, we think the bank is estopped to deny that such credit should be given.

For the reasons above set forth, the decree of the circuit court is affirmed.

Decree affirmed.

III. 208; Western v. American Lumber Co., 1907, 16 W.L.R. 100.

(See also 10 W.L.R. 100.)

the record. (Exhibit A, page 10.)

Under the facts shown by the record, the conclusion properly held that appellant, as next, best, and able to pay, was liable to the mortgage in question subject to the rights of appellee bank.

On the above stated facts, the Commission is of the opinion that the record is sufficient to sustain the holding of the Chancellor that the respondents do not have a right to the credit of the \$1000.00, covered by a receipt given by the respondent to the respondent, on account of a certain amount given by the respondent and also to the respondent and other amounts assigned to the bank. The Commission is of the opinion that the giving of this receipt by the respondent is sufficient to show the commission for the credit of the receipt. At any rate, we think the bank is entitled to the credit of the receipt.

For the purpose of the investigation, the following data were collected:

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

Caloptera

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 TA. 858²

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 8 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



IN RE PETITION FOR APPOINTMENT OF
 CONSERVATOR FOR HENRY KING? BY ANNA
 KING, PETITIONER, Appellee,

v.

HENRY KING, RESPONDENT, Appellant.

)
 :
)
 : Appeal from
) Circuit Court of
 : Rock Island County.
)

JONES P.J.

A petition was filed in the probate court of Rock Island County by Anna King on May 28, 1926, representing that her brother, Henry King, is or is supposed to be a mentally distracted person, incapable of managing and caring for his own estate and praying for the appointment of a conservator. On the hearing in the probate court, the jury found him to be a mentally distracted person. On appeal to the circuit court, a trial before a jury resulted in a like verdict, and an order was entered appointing a conservator for appellant. To reverse that judgment, this appeal is prosecuted.

At the time of the trial in the circuit court, appellant was 66 years old. His brother, Joe King, was 63 years old, and petitioner was 56 years old. About 24 years prior to the trial, Henry and his brother, Joe King, bought a farm about a mile south of the city of Moline, where they, with their mother, a younger brother and appellee, went to reside. The younger brother died shortly afterwards and the mother died in 1915. Before they moved to the farm they sold a residence for \$4500 which they owned in the city of Moline. The proceeds were turned over to Henry Gripp, a banker, under an agreement that he would pay them interest at five per cent. Appellant and Joe King engaged in the business of truck gardening, and so continued for about ten years. The money for sales was put in the bank and all the affairs of appellant, Joe King and

Appeal from
Circuit Court of
West Island County.

IN RE PETITION FOR APPOINTMENT OF
ADMINISTRATOR FOR ESTATE OF ANNA
KING, PETITIONER, Appellant.

v.

HENRY KING, Respondent, Appellee.

JAMES W. J.

A petition was filed in the probate court of West Island County by Anna King on May 22, 1922, representing that her brother, Henry King, is or is supposed to be a mentally diseased person, incapable of managing and caring for his own estate and property for the appointment of a conservator. On the hearing in the probate court, the jury found him to be a mentally diseased person. On appeal to the circuit court, a trial before a jury resulted in a like verdict, and an order was entered appointing a conservator for said person. To reverse that judgment, this appeal is presented.

At the time of the trial in the circuit court, appellant was 52 years old. His brother, the King, was 52 years old, and petitioner was 52 years old. About 52 years prior to the trial, Henry and his brother, the King, bought a tract of land south of the city of Seattle, where they, with their mother, a younger brother and appellee, went to reside. The younger brother died shortly afterwards and the mother died in 1912. Before they moved to the farm they sold a residence for \$1000 which they owned in the city of Seattle. The proceeds were turned over to Henry King, a woman, under an agreement that he would pay them interest at five per cent. Appellant and the King resided in the business of truck gardening, and so continued for about ten years. The money for sales was put in the bank and all the earnings of appellee, the King and

appellee were conducted on a community basis. Appellant kept the accounts and no settlement or distribution was made among them until he left the farm under the circumstances herein-after related. The account book was open to inspection by any member of the family at all times. The custody of their money etc. was entrusted to Henry Gripp.

The testimony tends to show that appellant and his sister had not enjoyed friendly relations for several years. About three years before he left the farm, the relations became so strained that he ceased to live in the house with her, but slept in an outbuilding on the premises. He prepared his own meals and did his own washing. The room he occupied was a workshop about 12 by 14 feet in size. It adjoined and was connected by a door with a chicken-coop. In the year 1923, appellant decided to leave the farm and the parties undertook a settlement, and division of their property. This culminated in appellant's conveying to Joe King his interest in the farm and equipment. He received about \$7,000 for his share of the whole community property. The property received by him in the settlement consisted of a \$500 Liberty Bond, some cash and all the interest of Joe King and appellee in the funds in possession of Henry Gripp.

After the settlement, appellant left the farm and shortly afterwards purchased a house on Rock River, where he was living at the time of the trial. The purchase price was \$2500, of which appellant furnished \$500. The remainder was represented by a mortgage of \$2,000. The property was later deeded by appellant to Henry Gripp.

To sustain the allegations of the petition, appellee, her brother, Joe, and one Andrew Stolbre were witnesses. The testimony of appellee was to the effect that for several years prior to the time appellant left the farm he used profane and abusive language toward her, called her vile names repeatedly and without good reason was inappreciative of what she did for

appellants were confined on a community basis. Appellants were
not permitted any visitation or telephone calls and were
not permitted to leave the prison under any circumstances.
After release. The second book was given to appellants by the
members of the family at all times. The members of the family
etc. was restricted to family visits.

The testimony tends to show that appellants and the
sister and not enjoyed family visits for several years.
About three years before he left the prison, the appellant be-
came so attached that he seemed to live in the prison with
her, but also in an outbuilding on the grounds. The ap-
pellant his own meals and all the other necessities.
There was a workshop about 100 ft. by 10 ft. in which he worked
and was connected by a door with a kitchen-cum. In the year
1958, appellant decided to leave the prison and the family
understood a settlement, and division of their property. While
eliminated in appellant's connection to the prison the interest
in the land and equipment. He received about \$7,000 for his
share of the whole community property. The property consisted
by him in the settlement consisted of a 1000 square foot
home and all the interest in the land and equipment in the
house in the section of Santa Clara.

After the settlement, appellant left the prison and
appellant attempted to purchase a house on Santa Clara, but he
was living at the time of the trial. The purchase price was
\$1500, of which appellant furnished \$500. The remainder was
represented by a mortgage of \$1,000. The property was later
leased to appellant at Santa Clara.

To establish the allegations of the petition, it is
the interest, was, and was a sister. Appellants were a settlement. The
testimony of appellant was to the effect that the settlement was
prior to the time appellant left the prison in 1958 and
effective January 1959, called for the return of property
and without good reason was inadmissible. It was the fact

him in the way of cooking, making his bed and other services. She testified that his conduct was disagreeable before his mother died and that it afterward grew worse; that he accused her of being friendly with him to get his money, became extremely untidy and dressed in dirty, ragged garments; that he refused to speak to her, wear the clothing she washed for him, or to sleep in the bed she made. She was corroborated by her brother, Joe King. They also testified that he used bran sacks for a mattress on his cot in the outbuilding, and an old sheeplined coat for cover; and that he ceased to read the newspapers and avoided company. They testified to other eccentricities and vexations habits of appellant. Appellee admitted she did not know of any money that Henry had received which was misspent or in any manner thrown away. She also testified that in the settlement, he received more than his share of the community property, and that such settlement was brought about as a result of his ultimatum.

The witness Stolbre testified that in the winter of 1922-1923, while he and appellant were putting up ice, they differed about the manner of handling the sawdust packing, and appellant finally agreed with the witness; that appellant talked about his sister, called her a vile name and complained that he got nothing to eat and had to sleep in the chicken coop; that appellant became angry at him for saying he should not be jealous of his sister. The witness was permitted to testify over objection by appellant, that from these facts he considered appellant feeble-minded. Appellee and Joe King were also permitted to testify, over appellant's objection, that from the conversations and acts to which they testified, they considered appellant insane on the day the petition was filed, May 28, 1926.

It is urged by appellee that appellant has turned over all his estate to a stranger to his blood without consideration and without anything to show his right thereto

or the amount of the same; that this shows an unprovoked insane desire to deprive his sister of any interest in the property and that it further shows he is incompetent to transact his own affairs and care for his own estate.

When the division of property was made, it was agreed that Henry should take, as his own the funds in the hands of Henry Gripp, which then belonged to Henry, appellee and Joe. The evidence shows there has been no change in the character of the possession of such funds by Gripp from that time to the time of the trial. Henry testified that he has an account of it; that it amounts to over \$7,000, and that there are papers in the bank at Moline in Gripp's possession ~~of~~ to show it, as well as, the interest of appellant in the property he deeded to Gripp. For many years Gripp was intrusted with the monetary affairs of the family about which they knew very little themselves. They confided in him implicitly, and the propriety of his acts was never questioned by any of them.

Appellee and Joe both testified that at the time Henry deeded his interest in the farm to Joe and a settlement of their property interests was had among all three of them, they considered him of unsound mind. At that time, they engaged with him in one of the most important transactions of his life. If they then thought he was mentally incompetent, it is strange that they did not exhibit the same interest in his welfare they now profess, and seek the appointment of a conservator. They knew his property was all being converted into personalty, which could be easily disposed of; They knew it was then in the hands of Henry Gripp. These facts tend to greatly lessen the weight of their testimony. Both appellee and Joe testified they had had no contact with Henry since he left the farm and knew nothing of his business dealings since then.

Appellee called Henry as a witness in support of the petition. He testified at considerable length and was sub-

of the amount of the same; and this shows an understanding
 between the parties as to the nature of the interest in the
 property and that it was intended to be conveyed to the
 party named in the deed.

Then the division of property was made. It was agreed
 that Henry should have, as his one-half share in the land of
 Henry's estate, which was referred to Henry, and the
 The evidence shows that the same was done in the
 of the possession of each half of the land from the time of the
 date of the deed. Henry's estate was not intended to
 it; that it amounted to over \$7,000, and that there was no
 in the fact as to the nature of the interest in the land,
 well as, the interest of the parties in the property as to the
 to Henry. The next point which was presented was the
 effect of the deed upon the parties named in the deed.
 That resulted in the division, and the parties in the deed
 was never questioned by any of them.

It appears that the parties named in the deed were
 divided the interest in the land as to the nature of their
 property interest and each all that of them, and the
 interest in the land was divided. It was agreed that
 him in one of the most important transactions of his life.
 If they were parties to the same, it is evident
 that they did not intend to have interest in the land as to
 the parties, and each the same as to the same.
 They were the parties to the deed, and each the same.
 The parties, which were the parties to the deed, and each
 it was then in the hands of Henry's estate. The parties
 to the deed were the parties to the deed, and each the same.
 and the parties to the deed and the parties to the deed
 no part of the land was intended to be conveyed to the
 same then.

It appears that the parties named in the deed were
 divided the interest in the land as to the nature of their
 property interest and each all that of them, and the
 interest in the land was divided. It was agreed that
 him in one of the most important transactions of his life.

jected to a rigid examination by appellee's counsel. Nothing whatever developed from his testimony which tends to show that he was of unsound mind or incapable of managing his business and affairs, but to the contrary, his testimony seems strongly to rebut the charge of incompetency. A number of witnesses who had known appellant from eight to forty years, and who had small business dealings with him testified they considered him sane and capable of transacting and taking care of his own business.

No improvident expenditure of his money, waste, extravagance or the giving away of any of his property is shown by the record. The record is not sufficient to show or to warrant an inference that he was at any time mentally incompetent to transact his business or take care of and manage his own property. On an application like the one in this case, the true question is whether the person has sufficient mental capacity to transact ordinary business--to take care of and manage his own property. (Snyder v. Snyder 142 Ill. 60; Leefers v. The People 123 Ill. App. 634.)

The verdict of the jury was against the manifest weight of the evidence. The judgment of the circuit court is reversed and the cause remanded.

Reversed and remanded.

...in a night examination of appellee's account. ...
...whatever developed from his testimony would be made known
...he can be examined and on occasion of examining his testimony
...and ability, but in the contrary, his testimony seems especially
...to reveal the change of intention. I cannot at this time
...who has known appellee from 1891 to 1901, and who
...has small business dealings with him testified that a considerable
...his name and capital of investment and business with him was
...business.

...to hypothetical examination of his account, would, in-
...have caused the living each of any of his business in 1901
...by the present. The present is not sufficient to show to be
...without an intention that he was at this moment in-
...connected to business his business on this date at that moment
...his own property. On an application for the same in this case,
...the first question is whether the parties are entitled to
...entirely in the present without business--the same case of 1901
...concerns his own property. (Exhibit A. Exhibit 142 LIT. 101)
...Leslie v. The People 123 Ill. App. 304.)
...The verdict of the jury was against the appellee
...weight of the evidence. The judgment of the circuit court
...is reversed and the case remanded.
...Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court



Whitaker

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGES, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 658³

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 8 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

| | | |
|--------------------------------|---|------------------|
| George D. Valentine, Appellee, | : | |
| | : | |
| v. | : | APPEAL FROM THE |
| | : | CIRCUIT COURT OF |
| JOHN WESLEY SHARP, and L. CORA | : | KNOX COUNTY. |
| SHARP, Appellants, | : | |

JONES P.J.

This is an appeal from an order granting T. M. Downing a writ of assistance for the possession of certain premises.

George D. Valentine obtained a decree for foreclosure and sale against John Wesley Sharp and Cora Sharp, the makers of a mortgage given to secure the payment of an indebtedness of \$3,000 and interest. The mortgaged premises were sold by the master, who issued a certificate of purchase to Valentine. He assigned the certificate to Downing. The premises were not redeemed and after the time for redemption had expired, the master executed and delivered a deed to Downing on January 29, 1927.

The answer to the petition for the writ of assistance alleged that after the delivery of the master's deed, an agreement was entered into between the defendants and Downing for a reconveyance of the premises to defendants; that the defendants were to pay Downing \$12,366.84, which sum includes the above mentioned mortgage indebtedness, and certain other indebtedness due complainant; that \$2,000 was to be paid on or before June 1, 1927, and the balance was to be paid in annual installments of \$500 each, together with interest at 8% per annum; and that if the said sum of \$2,000 and certain ^ataxes were paid, a bond for deed was to be executed by Downing to the defendants. A copy of said agreement dated April 8, 1927, is attached to the answer, but it is claimed the agreement was not executed until about May 15, 1927. The answer further alleges good faith and continued effort by defendants to procure the money with which to pay the \$2,000, and that by mutual agreement the time for such payment was extended to July 20, 1927.

No replication was filed or testimony taken, but the cause was heard upon the petition and answer. Under such circumstances, the answer is to be taken as true. (Roach v. Glos 181 Ill. 440; Straus v. Putta 265 id. 57.) The petition was filed on July 20, 1927, and it is contended that it was prematurely filed because the defendants were entitled to all of that day in which to pay the aforementioned sum of \$2,000. By the allegation in the answer, the time was extended "to July 20th". Where a contract provides that it is to extend to a certain date, the word "to" means "until" and does not include the day of that date. (Brandenburg v. Buda Company 299 Ill. 133.) The extension claimed in this case comes within that rule and the 20th day of July was not included. (Webster v. French 12 Ill. 301; Stearns v. Sweet 78 id 446; Burhans v. Village of Norwood Park 138 id. 147.) The petition was not filed before the time allowed for payment of the \$2,000 had expired.

Defendants claim that the record fails to show any notice to them of the filing of the petition. The petition alleges they were served and the answer does not deny it. Therefore, it is to be taken as admitted.

We think it was unnecessary to make the receiver, who had been appointed under a prior mortgage, a party of this proceeding. The foreclosure decree provides that the parties in possession of the premises shall surrender possession thereof to the petitioner upon failure to redeem within the statutory period. Defendants are not claiming under him and they cannot be heard to object because he was not made a party. (Kessinger v. Whittaker, 82 Ill. 22.) Whether or not Downing was a party to the original proceedings is immaterial. He became the assignee of the master's certificate of purchase and was the proper person to file the petition herein. The petition is in apt form and the order awarding the writ is sufficiently definite.

The application for a writ of assistance to carry out a decree of a court of equity is not the institution of a new suit, but a mere incident to the original suit, and is intended to carry out the decree previously entered, whereby the rights of the parties were fixed and determined. (Lancaster v. Snow 184 Ill. 534; Wahle v. Brackenseik 145 id 231.)

The answer of the defendants was filed seven days after the time in which they admit they were obliged, by the last extension of the contract, to make the payment of \$2,000. Notwithstanding the fact that the time had elapsed, there is no allegation in the answer that they had made a tender of the amount or were ready or able to pay it. Nor was any tender made with the answer. It alleges good faith and continued effort to procure money with which to make the payment of \$2,000, but it admits they have been unable to obtain the money. No fraud or sharp practice is shown on the part of Downing. The defendants were allowed to remain in possession of the premises for almost six months after the redemption period had expired. The final extension of time was by agreement fixed and definite. They have been unable to redeem either within the time allowed by law or within the time extended by agreement of the parties.

The writ was properly granted and the order of the circuit court is affirmed.

Order affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

Abstract
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 658⁴

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 8 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

PAULINA L. EFNER, EXECUTRIX
OF THE ESTATE OF EUGENE H. EFNER,
DECEASED, Appellee,

v.

CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY, A corporation,
Appellant.

:
:
:
:
: APPEAL FROM THE
: CIRCUIT COURT OF
: LASALLE COUNTY,
: ILLINOIS.
:

JONES P.J.

The plaintiff, as executrix of the estate of Eugene H. Efner, deceased, recovered a judgment for \$7500 against defendant on account of the death of said intestate. The declaration was in case and originally contained six counts. The 3rd, 4th and 5th counts were taken from the jury on motion of appellant. The case went to the jury on the 1st, 2nd and 6th counts.

The 1st count was a general negligence count. The 2nd charged that the decedent went on the tracks of the railroad company, at the crossing where he was killed, upon the invitation and direction of the company's flagman. The 3rd averred the failure of the railroad company to give timely warning of the approach of its train by blowing a whistle or ringing a bell as provided by law.

The accident which resulted in the death of plaintiff's intestate occurred at the crossing of defendant's railroad tracks over Chicago Street in the City of Marseilles. Chicago Street runs north and south through the eastern part of said city. Two main line tracks of railroad cross the street at about right angles and slightly downgrade toward the west. From 1000 to 1500 people live in that vicinity and the street is considerably traveled. The principal business district of the city is on Main Street more than a half mile to the west. The north railroad track is used by defendant's west-bound trains, and its south track by those eastbound. Two

bridges cross the Illinois & Michigan Canal, one at Main Street, the other at Chicago Street. The canal is about a half block south of Lincoln Street, which runs east and west about 150 feet south of defendant's tracks.

A bakery is located at the northeast corner of Lincoln and Chicago Streets. At the time of the accident there was a woodpile about ten feet high north of the bakery, and it was from fifty to fifty-five feet from the woodpile to the south rail of the westbound track. From the north side of the woodpile there was a clear and unobstructed view of the tracks to the east for three-quarters of a mile, or as far as the eye could see. At a point about twenty-five feet south of the eastbound track, Chicago Street begins to rise toward the level of the tracks, which are about four feet above the level of that street at its intersection with Lincoln Street. The street is paved north of the railroad tracks and the roadway south of the tracks is of cinders. There are dwellings and some stores on each side of the street. There were gates at the railroad crossing operated by a flagman, who was usually on duty from seven o'clock a.m. until eight o'clock p.m. of each day. There is testimony in the record tending to show the gates were sometimes operated as early as six-thirty o'clock a.m. but the flagman testified that he never operated them earlier than six minutes before seven o'clock a.m.

The gates were locked with a chain each night at eight o'clock and were locked at the time of the accident. The accident occurred about six-forty o'clock a.m. on September 2, 1924. The undisputed testimony shows that it was a clear day and the sun was shining. The decedent was on Chicago Street south of the railroad tracks driving his Ford truck north. There was a cab on the truck and some tools in the bottom of it. Decedent was a carpenter and contractor. At the time of the accident, he was fifty years

...and the ... I had ... all right and ...

There is a small amount of material in the collection of the
Library of the University of California, Berkeley, which is not
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Report to the Commission on the Status of the Woman

1. The first part of the report is a general statement of the purpose of the study and the scope of the work.

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Page 10 of 10

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of age and in good physical condition. He did not wear glasses and his hearing was normal. He had lived for two years on Chicago Street, about three blocks south of the scene of the accident. He had gone over the crossing many times between six and seven o'clock in the morning and was otherwise well acquainted with it.

On the morning of the accident, the flagman arrived at his position of duty about six thirty-five o'clock--raised the windows of his shanty, swept it out and sat down on his tool box outside, to smoke. He testified that the train was then approaching and he did not unlock the gates and let them down because there was not enough time. The train was an extra freight running west on the north track, and consisted of about forth cars. Decedent had been traveling at about fifteen miles an hour but as he proceeded up the incline to the tracks, he slowed down his truck and changed gears. The front end of the locomotive struck the truck at about the center of its right side and decedent received the injuries from which he died.

Plaintiff's claim that the train was running at a speed of forty to forty-five miles an hour is supported by one witness only. That witness testified that he was standing at the corner of Bluff and Chicago Streets which is 550 to 600 feet north of the crossing; that although he could not see the train until it got to the crossing on account of trees, still, in his judgment the speed of the train was from 40 to 45 miles an hour. Seven witnesses, on behalf of the defendant, placed the speed of the train from 20 to 25 miles per hour. Five of them were employees of the railroad company. The other two were not connected in any way with the defendant and were in the immediate vicinity of the accident when it occurred. There is some discrepancy in the evidence as to where the train stopped after the accident, but the manifest weight of the testimony is against plaintiff's contention that the train

was running from 40 to 45 miles an hour.

There was no direct testimony as to whether the decedent looked for the train, but the fact is undisputed that he had a clear view of the tracks for three-quarters of a mile to the east from a point at least fifty to fifty-five feet south of the west-bound track.

The evidence shows that when the decedent was crossing Lincoln Street and while he was 75 feet away from the crossing, the flagman ran out and began signalling the decedent to stop. The flagman did not have the regulation stop sign, but waved his hat and yelled at the decedent. We think the weight of the evidence shows that instead of the flagman conducting himself in a manner calculated to invite decedent to come upon the crossing, he did all that was within his power to prevent him from coming on to the tracks. Both the flagman and a man named Francisco frantically warned and yelled at decedent in a vain effort to stop him. They were directly north of the tracks. The flagman was in the middle of the street and Francisco was on the sidewalk to the east. The truck was making a noise and the flagman testified he believed decedent could not hear him. No witness on the part of appellee testified positively that the whistle was not blown or that the bell was not rung as the train approached the crossing. Several witnesses testified to hearing both bell and whistle. The weight of the testimony is that the statutory signal was given.

To warrant a recovery in an action for personal injuries there must be evidence tending to prove due care on the part of the person injured. Such due care cannot be presumed from the mere fact of the happening of the accident, the negligence of the defendant and a consideration of the human instinct of self-preservation. (Newell v. C.C.C. & St. L. Ry. Co. 261 Ill. 505; Opp v. Pryor 294 id. 538; Burns v. C. & A. RR. Co. 223 Ill. App. 439.) Liability cannot rest

upon imagination, speculation or conjecture, or upon a choice between two views equally compatible with the evidence, but must be based upon facts established by evidence fairly tending to prove them. (Burns v. C. & A. R.R. Co., supra; Peterson & Company v. Industrial Board of Illinois 281 Ill. 326; Wisconsin Steel Company v. Industrial Commission 208 id. 206.)

In this case, there is no evidence that the appellee's intestate made use of any of his faculties to ascertain whether a train was approaching, or that he did anything to avoid danger. He was well acquainted with the crossing. It was broad daylight and he had a clear view of the tracks toward the approaching train. Had he looked for it, he would have seen it in time to avoid the accident. He was in possession of all his faculties and was of sufficient age and judgment to understand and appreciate the danger of attempting to cross the railroad track in a truck that was making so much noise.

We are of the opinion that the testimony on behalf of appellee fails to establish that decedent was in the exercise of due care and caution for his own safety just before and at the time of the accident. His own negligence appears to have contributed to the accident which resulted in his death. When all of the testimony is considered together it is apparent that the verdict of the jury is against the manifest weight of the evidence. The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 658⁵

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 8 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

J. B. DICUS, Appellant,

v.

E. H. LUCAS, ET AL, Appellees.

)
:
) Appeal from Circuit
:
Court of Kane
:
County.
:
)

JONES P.J.

This is an appeal from a judgment in favor of the defendants in a proceeding for distress for rent instituted by the plaintiff, J.B. Dicus.

Appellee entered into a contract with one Julius Schlapp, in February 1920, for the purchase of 176 acres of land in Kane County. They paid a portion of the purchase price and entered into possession of the premises on March 1, 1920. The contract provided that the purchasers should pay the balance in installments until \$14,000 had been paid, when Schlapp was to deliver to the purchasers a warranty deed to the land, and they were to execute a trust deed, securing notes due ten years thereafter, for the balance of the purchase money. It also provided that in case the purchasers failed to make the payments or perform any of the covenants to be performed on their part, the contract, at the option of the first party, could be terminated, and appellees would forfeit all payments made by them, as liquidated damages, with the right of re-entry, etc.

Appellees made certain payments under the contract, the last of which was made in March, 1923. On September 5, 1924, Schlapp conveyed his interest in the premises by quit claim deed to Dicus, and on September 8, 1924, Dicus served a notice, demanding possession of the premises on account of default in making payments. He now claims that a short

Special Agent in Charge
Federal Bureau of Investigation
Washington, D. C.

J. P. BROWN, Appellant,
v.
E. H. KIMBLE, et al., Appellees.
()

JAMES P. L.

This is an appeal from a judgment in favor of the
defendants in a proceeding for judgment for rent paid
by the plaintiff, J. P. Brown.

Appellees entered into a contract with the plaintiff
Schlapp, in February 1930, for the purchase of the same of
land in Lake County. They paid a portion of the purchase
price and entered into possession of the premises on March 1,
1930. The contract provided that the purchasers should pay
the balance in installments until \$14,000 had been paid,
when Schlapp was to deliver to the purchasers a warranty deed
to the land, and they were to execute a trust deed, securing
notes due and payable thereafter, for the balance of the purchase
money. It also provided that in case the purchasers failed
to make the payments on portions of the premises to be
performed on their part, the contract, at the option of the time
party, could be terminated, and appellees would forfeit all pay-
ments made by them, as liquidated damages, with the right of
re-entry, etc.

Appellees made certain payments under the contract,
the last of which was made in March, 1935. On September 3,
1935, Schlapp conveyed his interest in the premises by deed
claim deed to him, and on September 8, 1935, appellees served
a notice, demanding possession of the premises on account
of failure in making payments. He now claims that a short

time thereafter, he entered into a verbal lease with appellees for said premises for a period of two years, commencing March 1, 1923, at the rate of \$7.00 per acre. Appellees deny the alleged leasing and say they never attorned to him. The record does not disclose that they ever made any payment to appellant on any account. They sold the products of the farm, including some barley delivered to John Winterhalter at his warehouse in Lily Lake. The proceeds of this sale were later paid into court.

On October 11, 1924, Dicus caused a distress warrant to be served on appellees in which he claimed \$1953 due him as rent, and on the same day served a five days' notice on appellees in which he claimed the same amount. Nothing further was done until February 14, 1925 when Dicus caused another distress warrant to be served, claiming \$2112 due him. This warrant was levied upon all the property of appellees and also upon the barley which had been delivered to Winterhalter. Appellees filed the general issue and a plea denying that the relation of landlord and tenant existed between the parties. A jury was waived and trial by the court resulted in a judgment for appellees quashing the levy and ordering the proceeds of the sale of the barley turned over to appellees.

The rule is well settled that there can be no distress for rent unless the relation of landlord and tenant exists between the parties; and there must be a certain fixed rent in money, produce or services, payable at a certain time. (Marr v. Ray, 151 Ill. 340; Bates v. Hallinan, 200 id. 21.) The remedy is statutory and distress cannot be levied for anything other than rent. (Bates v. Hallinan, supra; Lord v. Johnson, 120 Ill. App. 55.) Where one acquires possession of land under a contract of sale, the relation between the parties is that of vendor and purchaser and not that of landlord and tenant, notwithstanding the purchaser has failed or refused to perform the contract. (McNair v. Schwartz, 16 Ill. 24.) Dicus purchased the premises on September 5, 1924.

this agreement, he entered into a verbal lease with applicant
for said premises for a period of two years, commencing March 1,
1934, at the rate of \$1.00 per acre, applicant being the assignee
thereof and not being ever assigned to him. The parties also had
discussed that they ever made any written agreement as to
apportionment. They sold the proceeds of the lease, including the
balance delivered to him, to applicant at the same time as the
lease. The proceeds of this sale were \$1.00 per acre.
On October 11, 1934, applicant entered a lease with
to be served as applicant in which he claimed that the
as well, and he was not aware of the fact that he
applicant in which he claimed the same amount. Applicant further
was done until February 14, 1935 when the same amount was
applicant, except to be served, claiming that the same
was not the fact that all the property of applicant was also
upon the parties which had been delivered to the applicant.
Applicant filed the correct lease with a fine for the same
relation of landlord and tenant existed between the parties.
A jury was called and held by the court that in a judgment
for applicant against the party and against the proceeds of the
sale of the parties turned over to applicant.
The rule is well settled that they can be an assignee
for two reasons: the relation of landlord and tenant exists
between the parties; and there must be a contract that there is
some, present or future, payment at a certain time, there is
not, for the parties to the lease, the parties to the lease.
In applicant and applicant cannot be served the same amount
from each. (See also, applicant, applicant, and applicant, the parties
app. 10.) There was no contract between the parties as to
that of sale, the relation between the parties is that of
vendor and vendee, and not that of landlord and tenant,
notwithstanding the fact that the parties are related to the
the parties. (See also, applicant, the parties, the parties,
the parties and applicant on applicant, the parties, the parties,

He had no interest in the property previous to that time. Three days thereafter he served notice upon appellees of their forfeiture of the contract and demanded possession of the premises. The notice recognized that appellees were holding possession under their contract of purchase. The claim of the existence of the relationship of landlord and tenant is based upon the alleged verbal lease. No witness, other than Dieus, testified to such an agreement. Appellees denied that any such lease or agreement was entered into and the fact that they were never called upon to surrender their contract of purchase seems to corroborate their testimony.

The trial court saw and heard the witnesses. It was in a better position to judge of the weight that should be given to the testimony than a court of review can be. In such case an appellate tribunal will not disturb the findings of the trial court, unless manifestly against the weight of the evidence; (Johnson v. McNellis 228 Ill. 351; Arnold v. N.W. Tel. Co. 199 id. 201.) and it does not seem to us that the weight of the evidence shows the relation of landlord and tenant to have existed as claimed by appellant. Therefore, the judgment of the circuit court, was correct and is affirmed.

Judgment affirmed.

It had no interest in the property previous to that time. These facts notwithstanding he served notice upon appellants of their liability for the cost of the suit and demanded possession of the premises. The police responded that appellants were holding possession under their contract of purchase. The object of the evidence on the relationship of landlord and tenant is to show that the alleged verbal lease. No witness, except those named, testified to such an agreement. Appellants denied that they were never in agreement and entered into and that that they were never called upon to surrender their contract of purchase down to certain agents their testimony.

The trial court saw and heard the witnesses. It was in a better position to judge of the weight and value of the evidence than a court of review can be. It is not the duty of the appellate court to sit in review of the trial court, unless manifestly unjust and wrong of the evidence; (Laramie v. McFarlin 111 Ill. 304; Smith v. N.Y. Tel. Co. 112 Ill. 301.) and it does not appear to us that the weight of the evidence shown the relation of landlord and tenant to have existed as claimed by appellants. Therefore, the judgment of the circuit court, was correct and is affirmed.

Reversed and affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

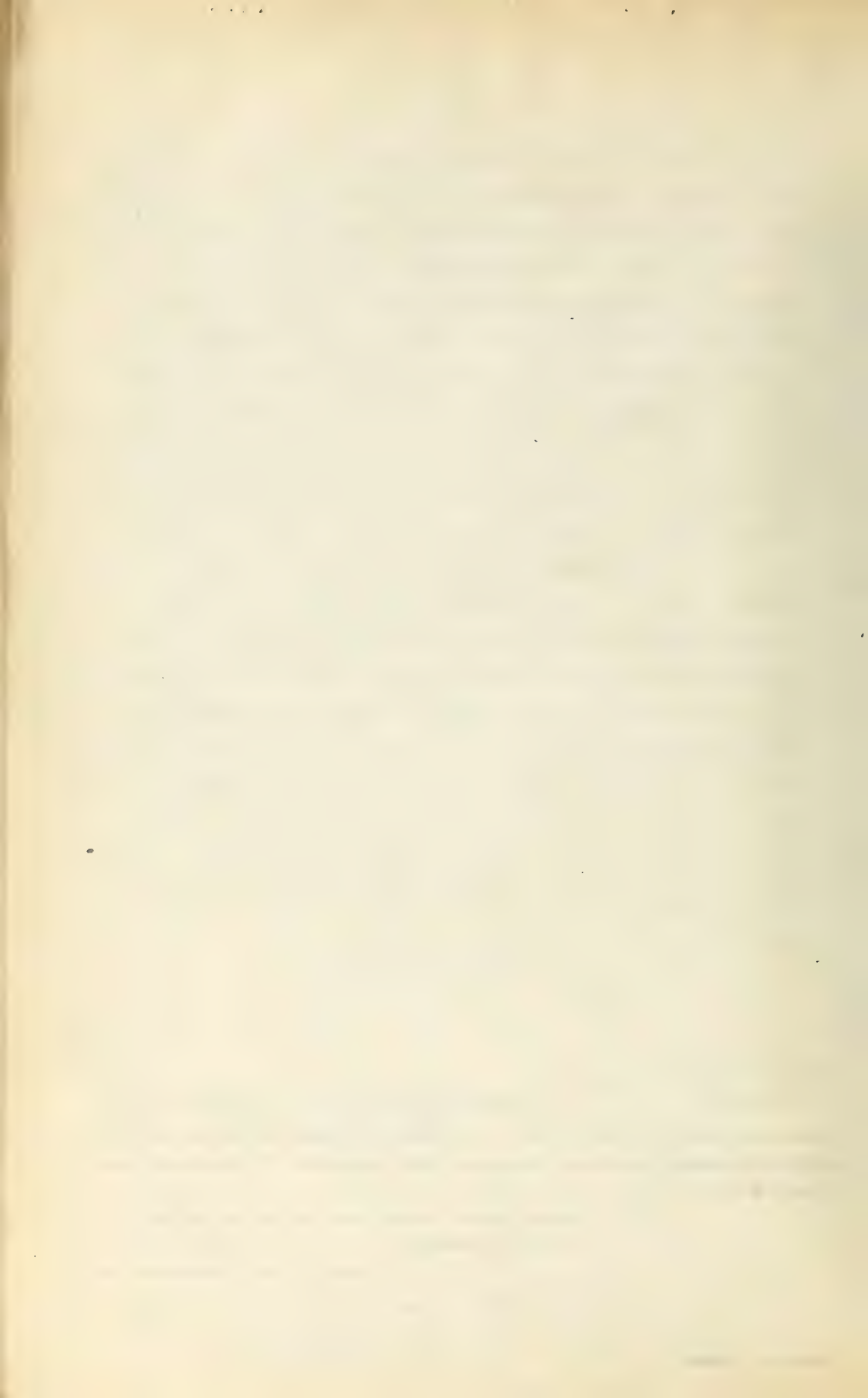
} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and

for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and twenty-_____

Clerk of the Appellate Court



Abstract
AT A TERM OF THE APPELLATE COURT

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 659¹

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 8 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

LEAH MOON, Appellee,

v.

GEORGE L. COMISKY, Appellant,

APPEAL FROM THE
CIRCUIT COURT OF
LA SALLE COUNTY.

JONES P.J.

On October 14, 1925, the plaintiff, Leah Moon, obtained a judgment by confession against Conrad Myers and the appellant, George L. Comisky, on a note dated December 17, 1921, for \$2025 payable to the order of W. A. Moon. The note purports to have been signed by Conrad Myers and the appellant Comisky. Myers admits he signed it, but the purported signature of Comisky is denied.

On motion of Comisky, supported by affidavits of himself and Myers, the judgment was opened up and leave given Comisky to plead. He filed the general issue and three special pleas. The first special plea denies that he executed the note. The second special plea avers that the note was not assigned to and did not become the property of Leah Moon until long after it became due by its terms, and that the time for payment was extended from time to time for a period of three years without Comisky's knowledge or consent. The third special plea is substantially the same as the second, but avers that Comisky had not waived his rights as to such extension, all of which was known by the payee of the note. Attached to the pleas is appellant's affidavit denying that he ever signed the note in question. Issue was joined on the pleas and a jury trial was had resulting in a verdict and judgment in favor of the plaintiff.

Prior to January 1, 1921, W. A. Moon, husband of appellee, operated a private bank at Lenore, Illinois, of which one Jack Miller was cashier. The bank was organized as a state bank about the date mentioned. Moon was elected President

and Miller continued as cashier sometime later. On December 13, 1921, a man named Leangler became cashier. Prior to November 18, 1921, Conrad Myers was indebted to the bank in the sum of \$2025, for which the bank held his individual note. On that day, or within a few days thereafter, Myers and Comisky executed their joint note to the bank for said amount due six months after its date. This note was given in lieu of the Myers note. When the bank was organized as a state bank, Moon paid for and took over this note with other notes. He deposited it and some of the other notes with the Union National Bank of Streator, as collateral security for money borrowed by him from that bank. About a year later the note was renewed.

Moon died in 1924 and at the time of his death the note sued on was in the possession of the said Union National Bank. Appellee, widow and sole legatee of Moon, settled with said bank and took up the collateral notes, aggregating slightly more than \$10,000. Myers had paid the interest on the note in question up to March 12, 1924. He went into bankruptcy in the Spring of that year.

On the trial four instruments which Comisky admitted contained his genuine signatures were admitted as standards of comparison. An examiner of disputed handwritings, who had been actively engaged in that profession forty-six years, testified that in his opinion the signature to the note sued on is the genuine signature of Comisky. He gave detailed reasons for his opinion. The assistant cashier of the State Bank of Lenore testified that she had known appellant for eight years--had seen him write his name frequently within the last three or four months--knew his signature and that in her opinion the signature on the note in question is Comisky's genuine signature.

Appellant denied the signature and a former banker who had been a bank examiner testified that in his opinion the signature on the note in question is not the same as

[illegible]

that on the exhibits admitted as standards of comparison. He first saw the instruments fifteen minutes before he took the witness stand.

Myers testified that when he signed the note in question at the bank in Lenore, Comisky was not present and that he told Miller that Comisky would not sign any more notes with him. However, Miller required Myers to leave the old note at the bank until the new one had been signed by Comisky.

Appellant testified that he never signed any note with Myers after November 1920, but in his affidavit made to open up the judgment by confession, he stated that the note signed by him did not bear date of December 17th, 1921 and that he never executed a note to Moon bearing that date; "that at a time earlier ranging somewhere between twelve and eighteen months prior to December 17, 1921, he signed a note with said Myers payable to the order of said bank and which note, when it became due or sometime thereafter, was renewed and again signed by affiant, but that the signing of said note or notes was not done by affiant in ink, and that the renewal note mentioned aforesaid was later assigned and transferred to the Union National Bank of Streator and held by said bank as collateral or otherwise, and later paid or satisfied by the payment of cash or the offering of another note as affiant was advised by one Walter Plumb, who was then president of said Union National Bank." It will be observed that appellant then admitted he had signed a note renewing the note of November 18, 1920 and that the renewal was placed with the Union National Bank as collateral. His testimony also developed the fact that the conversation he had with Walter Plumb was in March, 1921, and concerned the note of November 18, 1920. We are of the opinion that the evidence fully warranted the jury in finding that the note in question was signed by Comisky and that the signature thereon is his genuine signature.

The court refused to permit appellant to testify to a conversation claimed to have been had between him and Miller

prior to the signing of the note in November, 1920. The offered testimony was to the effect that Miller told Comisky that the bank was to become a state bank and it was necessary to have another signature on the note with Myers; that Myers was good, but they wanted Comisky's signature for that purpose and if he would sign the note, they would guarantee he would never have to pay anything on it. The court also refused to admit a later conversation, claimed to have been had with Miller before the note became due, in which Miller is said to have told Comisky that he need give the note no further consideration, and that he was wholly released. The note here in question is the note dated December 17, 1921 and the purported conversations related to a note of November 1920 and were immaterial. There was no error in refusing to admit the testimony.

No error was committed in not permitting the witness Smith to testify that Miller had admitted forging Smith's name to certain notes. The Smith notes were in no way connected with the transaction in this case. The admission of the testimony would have introduced a collateral issue not raised by the pleadings and calculated to divert the minds of the jury from the real issue and mislead them. The testimony was properly denied. (Bennett v. Riverdale Distillery Co. 15 Ill. App. 57; Burroughs v. Comegys 17 id. 653; Buckley v. Acme Food Co. 113 id. 210.)

Appellant complains that he was prejudiced by certain questions asked by counsel for appellee in the examination of witnesses. Objections were sustained to practically all of such questions. The record discloses that questions equally improper were also asked by counsel for appellant. We cannot approve the conduct of either counsel in this respect, but we think neither party was seriously prejudiced.

There is no testimony in the record tending to show that the time of payment was ever extended as claimed by

prior to the signing of the lease in November, 1930. The witness
testimony was to the effect that after said lease was
the land was to be used as a stock farm and it was necessary to
have another agreement on the land with respect to the stock
and feed, and that was the subject of the witness's testimony. The witness
said that it is well known that the stock, which would be
be used never was to be put on the land. The witness said
that as a result of a later investigation, which he later
had with Miller before the sale was made, it was then
it was to have said property land to use for the stock
as a stock farm, and that he was really interested.
The witness says he testified in the case before the jury
in 1931 and was not put in any position to make a statement
November 1930 and was not interested. There was no other
reference to this in the testimony.
The witness was admitted to the witness stand in 1931
and said he testified that Miller had said that the witness
was to receive money. The witness said that he was
connected with the transaction in this case. The witness
of the testimony which have introduced a statement made
was taken by the plaintiff and referred to several
times of the fact that the land was sold and Miller had
The testimony was properly denied. (Exhibit 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 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1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 1335, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 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2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184,

appellant. Myers testified that the matter was not discussed when he paid the interest and there is no showing that any interest was paid in advance. The mere payment of accrued interest would not have the effect of extending the time for payment of the principal. In addition to this, the note recites that all signers are principals and that the note may be extended without notice to any of the makers.

It is next complained that the court erred in giving certain instructions on behalf of appellee which did not require proof by a preponderance of the evidence. Instructions are to be considered as a series. Taken as such, several instructions were given which informed the jury that plaintiff must prove her case by a preponderance of the evidence. It is not necessary that the word "preponderance" be contained in all of the instructions. (Gilmore v. Killion 281 Ill. 154.)

The 4th instruction given on behalf of appellee is complained of as tending to impress the jury that they should not lay too much stress on the denial of his signature by Comisky. The instruction informed the jury that they must consider all the testimony and every fact and circumstance in evidence. It states a correct proposition of law and we think it does not call undue attention to Comisky.

The subject matter of appellant's refused instructions 19 and 20 was fully covered by other given instructions and the court properly refused said two instructions.

The 23rd refused instruction offered on behalf of appellant informed the jury that the appellant had a right to plead as many different matters of defense as he saw fit and it is claimed that the instruction was made necessary, because the argument of appellee's counsel to the jury pointed out alleged inconsistencies in appellant's pleas. No exceptions were preserved to the argument of coun-

sel and it is not made a part of the record. There was no occasion for giving the instruction, even if otherwise proper. The portion of the argument referred to was attempted to be brought into the record by affidavits filed in support of the motion for a new trial. It is well settled that such matters cannot be shown in that way. (Peyton v. Village of Morgan Park 172 Ill. 102; Mayes v. People 106 id. 306; Allen v. Clark 108 Ill. App. 446.)

Finding no reversible error in the record, the judgment of the trial court is affirmed.

Judgment affirmed.

[illegible]

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 659²

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 8 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

| | | |
|------------------|---|---------------------------|
| EMMA SIMPSON AND | : | |
| DAISY LUCE. | : | |
| APPELLEES. | : | |
| | : | |
| V S. | : | APPEAL FROM CIRCUIT COURT |
| | : | |
| EUNICE SPACKMAN, | : | OF BOONE COUNTY. |
| APPELLANT. | : | |

JETT. J.

Emma Simpson and Daisy Luce, appellees, filed a bill in the circuit court of Boone County, alleging that on October 17, 1914, Eliza Spackman, being indebted to Emma Simpson in the sum of \$1500.00, for money expended by her for the improvement of real estate owned and occupied by the said Eliza Spackman, which said real estate is described as follows: -Lot One (1), in Block One (1) of B. W. Dean's Addition to the Town (now city) of Belvidere, as platted and recorded in the recorder's office of Boone County, Illinois, excepting therefrom the west eight rods of the south four rods of the above described premises; and it is further charged in said bill that the said Eliza Spackman, also being indebted to the complainant, Daisy Luce, for services in nursing and caring for the said Eliza Spackman, and wishing to procure from the complainants further nurture and care of herself and money for the improvement of said premises, from time to time, made, executed and delivered to the complainants, an instrument in writing, which said instrument is in the words, letters and figures as follows, "Belvidere, Illinois, October 17, 1914, I hereby acknowledge my indebtedness to my daughter Daisy Spackman for her services in nursing and caring for me during my illness, and to my daughter Emma Spackman Simpson, for sums expended in the improvement of my property.

Signed, Eliza Spackman,

Witness: Emily D. Sweet."

ALVIN, JOHN ELMER, COURT
OF BOND COUNTY.

FROM ALVIN AND
JOHN ELMER,
ATTORNEYS.
V. S.
JOHN ELMER,
ATTORNEY.

1887. 1.

That Simpson and Peter Lane, negroes, filed a bill
in the circuit court of Boone County, Arkansas, on October
17, 1914, Eliza Spackman, being interested in said
sum of \$1800.00, for money expended by her for the improvement of
real estate owned and occupied by the said Eliza Spackman, which
said real estate is described as follows: Lot No. 11, in Block
One (1) of E. W. Dean's Addition to the town of Bell
Bellevue, as platted and recorded in the recorder's office of
Boone County, Illinois, excepting therefrom the west half of
the south four rods of the above described parcel; and it is
further averred in said bill that the said Eliza Spackman, also
being interested in the complainant, Peter Lane, the services in
negotiating and saving for the said Eliza Spackman, and paying to
procure from the complainant Peter Lane and part of said bill
and money for the improvement of said parcel, that said bill
made, executed and delivered to the complainant, as defendant
in writing, which said instrument is in the words, to-wit: I
herby acknowledge my indebtedness to my daughter Eliza Spackman
for her services in negotiating and saving for me money to-wit:
and to my daughter Peter Lane Simpson, for money expended in
the improvement of my property.

Witness: Emily D. Sweet.

Complainants then allege that the said Eliza Spackman, was on the 17th day of October 1914, and for a long time prior thereto, and at all times subsequent thereto, until the time of her death, helpless and bed ridden and in need of care and nursing and support, and of money with which to improve and repair her home, and was during all times occupying the above described real estate as and for her homestead.

Complainants further allege that said Eliza Spackman agreed with them that said written document, heretofore set out, should become and be a first lien upon said real estate herein described, and that she so stated and announced to the complainants; that said written instrument should be held as such security for the amount of money due them respectively, at the time of the death of the said Eliza Spackman; that Eunice Spackman, now married, whose name is Eunice Spackman Wrate, (who is a plaintiff in this cause,) is a daughter of the said Eliza Spackman, and at the time of the execution and delivery of said instrument, was living in the home of said Eliza Spackman, and that said Eunice Spackman Wrate, was informed and advised, and knew of the fact that the said written instrument was executed and delivered to the complainants, and knew of the indebtedness, and knew that Eliza Spackman agreed with the complainants that said written instrument should be a first lien on the premises to secure the payment of their claims, upon the death of the said Eliza Spackman; that notwithstanding the fact that the said Eliza Spackman had delivered the written instrument to the complainants, Eunice Spackman Wrate thereafter, to-wit, on the 20th day of April, 1922, accepted and received from the said Eliza Spackman, an instrument in writing, being a warranty deed by Eliza Spackman, conveying the premises mentioned and described herein to the said Eunice Spackman Wrate; that the said Eunice Spackman Wrate, grantee in said deed, used and exercised many undue arts and fraudulent practices, and resorted to mis-representations to induce the said Eliza Spackman to execute

and deliver said instrument, being said deed, and that the said Eliza Spackman was unduly influenced by the said Eunice Spackman Wrate, to execute the deed; and appellees further charge that they are entitled to a lien on said premises in the amount owing to them respectively, as set forth in said bill, and pray that the amount be declared a lien on said premises.

The appellant, Eunice Spackman Wrate, filed an answer to said bill of complaint, in and by which she among other things, denied that the complainants were entitled to the relief prayed for or any part thereof; and denied that Eliza Spackman was indebted to the complainants as set forth in their bill of complaint she admits that she is a daughter of the late Eliza Spackman, deceased, and that she was living with her mother on the 17th day of October, 1914; and denies that she was advised and informed and knew that the said instrument was executed and delivered to the complainants, and denies that she had any knowledge of the said alleged matters whatever; she denies that on or about the 29th day of April, 1922, she accepted and received from the said Eliza Spackman an instrument in writing, a deed, a copy of which is attached to and made a part of the complainant's bill, but on the contrary states and avers the fact to be that she received and accepted a deed on the 28th day of November, 1921, that the same was duly executed and acknowledged by Eliza Spackman, her mother, and thereafter duly delivered to her, the said Eunice Spackman Wrate, and was held and controlled in the exclusive possession and dominion of this defendant, and was afterward on the 24th day of April, 1922, recorded in the recorder's office of Boone County, Illinois, and that said deed has from the time of its execution and delivery, and up to the present time, and still in a valid and legal transfer and conveyance from Eliza Spackman to this appellant, Eunice Spackman Wrate, of the real estate mentioned and described in the bill of complaint, and that upon the execution and delivery of said deed, by Eliza Spackman to this defendant, she became seized

After the first trial, the jury was told that the defendant was not guilty of the crime charged. The jury then returned a verdict of not guilty. The defendant was released from custody. The case was closed.

[illegible]

of the real estate in fee simple, and possession thereof was duly delivered to her and accepted by her, and she thereupon took, and continued to keep the possession of the said real estate during the time aforesaid, and still keeps and retains the same; that her claim of ownership and right in the real estate described, is founded on a good, adequate, valuable and sufficient consideration, amounting to at least the sum of \$5,000.00, and the said real estate at the time the same was conveyed to her was not of a value to exceed \$4500.00, but that the said Eliza Spackman, being indebted to this defendant, at said time in the sum of \$5,000.00 for labor and services, nursing and care, and in consideration of such indebtedness, which she had agreed to pay to the appellant, from time to time, executed and delivered the said deed of conveyance, of said real estate, to this defendant. Certain of the other children and heirs of Eliza Spackman, deceased, filed a cross bill, setting forth that the deed in question to the appellant, should be set aside for the reason that said deceased was not mentally competent to make the same, and praying partition of said premises among the parties entitled thereto, subject to the lien as claimed by appellees. Leave was given appellees to amend their said bill to the effect that said deed to the appellant should be held ineffective as against their lien, for the reason that said deceased was not mentally competent to make the same.

On a hearing the court dismissed the cross bill and held the deed to appellant to have been made by said deceased while she was ~~mentally~~ mentally competent to make the same; that the said deed to appellant was in fact, a trust. The court found among other things, that during the month of November, 1921, Eliza Spackman executed a warranty deed of the property described herein, to her said daughter Eunice Spackman, then unmarried, and now Eunice Spackman Wrate, which conveyance then the court finds was given subject to said claims as herein defined, and said title was to be held by Eunice Spackman Wrate in trust; that said Eunice Spackman

of the real estate in the village, and possession thereof was this
delivered to her and as stated by her, and the testimony of her,
continued to have the possession of the real estate during the
time aforesaid, and still retain and exercise the same; that the claim
of ownership and right in the real estate aforesaid, is founded on
a good, adequate, valuable and well established consideration, amounting
to at least the sum of \$1,000.00, and the said real estate at the
time the same was conveyed to her was not of a value to exceed
\$1,000.00, and that the said Alice Spackman, before referred to, is the
beneficiary, at said time in the sum of \$1,000.00, the latter was con-
veyed, during said time, and in consideration of such consideration,
which she was bound to pay to the respondent, from time to time,
exclusive and delivered the said land of respondents, of said real
estate, to said defendant. Details of the above claim and delivery
of Alice Spackman, respondent, filed a copy with, stating facts and
the deed in question to the respondent, which is not valid for the
reason that said deceased was not mentally competent to make the
same, and previous partition of said property among the parties co-
titled thereto, subject to the claim as claimed by respondent.
There was given evidence to show that said will is the effect
that said will is to the respondent should be held invalid as
against said will, and the reason that said deceased was not
mentally competent to make the same.

As a matter of course, the court should find that said will
shall be held to be invalid to the extent of said testament
while she was mentally incompetent to make the same; that the said
last will and testament was in fact, a trust. The court found more-
over, that, that during the month of November, 1911, Alice Spack-
man executed a warranty deed to the property described herein, to her
said daughter Alice Spackman, then married, and her heirs
and assigns forever, which conveyance from the court finds was given
subject to said claim as herein before stated, and said will was to
be held by Alice Spackman in trust; that said Alice Spackman

Wrate took and accepted said deed with full knowledge of the claims of Emma Simpson and Daisy Luce, and with the understanding that she was to share with the said Emma Simpson and Daisy Luce, equitably out of said property, to the end that the claims of the three should be paid proportionally; as far as the property would go in that behalf.

The court further finds that Emma Simpson furnished money for said improvements and for the payment of taxes in the amount of \$1700.00, of which amount substantially the sum of \$1000 was for repairs and expenditures upon the property of the deceased, prior to October 17, 1924; and that she is entitled to interest thereon for the period of seven years at the rate of five per cent making \$350.00, or a total allowance to the said Emma Simpson of \$2050.00; that the said Daisy Luce is entitled to pay for services rendered for the period of five years at \$6.00 per week, being a total of \$1560.00; that the said Eunice Spackman Wrate performed services commencing in the year 1914, and continuing approximately seven years, and for that portion of said seven years, commencing in 1914, and running for three years, she was allowed at the rate of \$6.00 per week, or a total of \$900.00, and for the four years running from 1917 to 1921, allowed for said services at the rate of \$10.00 per week, or a total of \$2000.00, making in all for the seven years period, the sum of \$2900.00. The court further finds that these claims for such services, reduced to percentages, are as follows, to-wit: To Emma Simpson, 31.5 per cent thereof; to Daisy Luce, 23.96 per cent thereof; to Eunice Spackman Wrate, 44.54 per cent thereof.

It was then decreed that said described real estate be and the same was held and owned in fee simple as follows, to-wit; complainant Emma Simpson, an undivided 31.5 per cent thereof; complainant Daisy Luce, an undivided 23.96 per cent thereof; and appellant Eunice Spackman Wrate, an undivided 44.54 per cent thereof; that said premises be held in said ratio pro rata, by them as tenants in common with all the rights and privileges to said

premises, and possession thereof, as such tenants in common.

There being no one appealing in this case except Eunice Spackman Wrate, the appellant, it is unnecessary, on account of the conclusion we have reached, to make any mention of the cross bill and answers thereto, because the cross bill was dismissed, and none of the cross complainants have prosecuted any appeal.

We have set out the bill, answers and findings of the court, with a view of showing what the issue was when the case was presented to the chancellor for a hearing. It will be observed that the complainants charged in their bill, that the deceased Eliza Spackman, made and executed a deed of the premises involved in this proceeding, to the appellant, Eunice Spackman Wrate; that she claims to be the owner in fee of said premises. It will be observed further that the defendant Eunice Spackman Wrate defended the suit upon the ground that she was the owner of the premises in question by reason of the deed, conveying the premises to her by Eliza Spackman. The case was tried upon the theory, upon the part of Eunice Spackman Wrate, that she was the owner of the premises, and she established the fact that the deceased was mentally competent at the time of the execution of the deed, to execute and deliver a deed. In this state of the record, when the case came to this court, the appellees entered a motion to transfer said cause to the Supreme Court of Illinois, for the reason that the object of said cause is for the recovery of a freehold, and to determine in whom the freehold is vested; that because of such, the appellate court is without jurisdiction, and jurisdiction of said cause is properly in the Supreme Court. The question now is, in view of the state of the record, Is a freehold involved?

We have set out the findings of the court in part, together with a part of the decree, showing the findings made by the court in relation to the ownership of the property. It is thus seen that the court made a definite finding as to the ownership of lifetime, and found that the fee simple title to the same was in

provision, and possession thereof, or some interest in common.

There being no one entitled in this case except

James Frederick Smith, the applicant, it is accordingly, on account

of the association we have formed, it may not appear of the

above will not require further, because the order will not be

made, and none of the other applicants will be admitted into

association.

We have not yet met with any, however and therefore of

the court, with a view of making what we have not yet

made was proposed to the association for a meeting. It will be

observed that the association was held on July 11th, and the

association being dissolved, and not receiving a vote at the meeting

held on July 11th, in the evening, James Frederick Smith

being that day and night in the house in the city of New York.

It will be observed further that the order of James Frederick Smith

being that day and night in the house in the city of New York.

Further it appears of record of the fact, that the order was

made by James Frederick Smith. The order was made by James

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the three persons so named in said decree, to the exclusion of the other heirs of the deceased. The decree determines in whom the freehold was vested, and that the object of the bill was for the recovery of the freehold. In *Lehmann, et al. vs. Rathbarth*, 111 Ill. 185, a bill was filed for the purpose of showing a resulting trust in land. A decree was entered in accordance with the prayer of the bill, and the Supreme Court, in entertaining jurisdiction of the appeal at page 194 said "The question presented by the motion is whether under the pleadings and proof, a freehold is involved, it being insisted that there is no other ground upon which jurisdiction of the court can rest. This question must be answered in the affirmative. One of the main objects of the bill is to recover an equitable freehold in land, or, in other words, to establish a resulting trust in freehold estate, ~~§---~~ which necessarily involves a freehold." In *Walker vs. Rand, et al.*, 31 Ill. App. 436, a bill was filed for the assignment of dower; the court refused to entertain jurisdiction, saying "In addition to this objection to the jurisdiction, the appellant seeks to have a title, which is a fee simple title on its face, declared to be only an incumbrance to which she shall be required to contribute. The effect of granting this relief is to destroy the freehold. In principle it is like establishing a resulting trust, a subject that pertains to the direct Appellate jurisdiction of the Supreme Court." In *I.C.R.Co. vs. Queen City Building Corporation*, 313 Ill. 539, the court laid down the test for determining when a freehold is involved, saying that on page 540; "A freehold is involved only where the necessary result of the decree is that one party gains, and the other party loses a freehold, or where the title to a freehold is so put in issue by the pleadings, that the decision of the case necessarily involves a decision of such issue."

In the instant case, the complainants and appellant were decreed to be the owners in fee simple of the freehold involved and certain of the defendants who were heirs of the deceased, were

decreed not to have any interest in the freehold involved. The appellant, Eunice Spackman Wrate, was decreed to be a tenant in common with the complainants. Her interest in the freehold in question was diminished from an absolute interest, which she claimed by virtue of the deed, purported to have been given to her, to 44.59 percent thereof.

The decree found that certain new parties have acquired an interest, as tenants in common, in the freehold, and that the appellant Eunice Spackman Wrate thereby lost a substantial part of her interest in the freehold, which she claimed by virtue of the deed, executed and delivered to her by Eliza Spackman.

In view of the allegations of the bill of complaint and the answer thereto, and the contention of appellant, by which she claims the ownership of the entire premises, and to hold the same by authority of a warranty deed, a freehold is involved, and the motion of the appellees to transfer the case to the Supreme Court, should be allowed, which is accordingly done, and cause is transferred to the Supreme Court.

Transferred to the Supreme Court.

document not to have been issued in the Swedish language. The
original, which appears to be a copy of a letter, is
written in the Swedish language. The subject of the document is
concerned with the relations between the Swedish government and the
Swedish people. It is a document of great importance, and it is
to be published in the Swedish language.

The document is a copy of a letter, and it is written in the
Swedish language. It is a document of great importance, and it is
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Document of the Swedish government.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 659³

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 8 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

HARRY B. WELLS & R. J. :
 CHAMPAYNE, CO PARTNERS, :
 DOING BUSINESS UNDER THE :
 FIRM NAME OF WELLS; FENDER :
 & ENAMELING WORKS. :
 APPELLEES :
 V S. :
 CAMDEN FIRE INSURANCE :
 ASSOCIATION. :
 APPELLANT.

A PEAL FROM THE
 CIRCUIT COURT OF WINNEBAGO
 COUNTY.

Jett. J.

Harry B. Wells and R. J. Champayne, co-partners, doing business under the firm name of Wells Fender and Enameling Works, Appellees, brought suit against Camden Fire Insurance Association, Appellant, in the circuit court of Winnebago County, to recover for repairs made to one Richenbacker Brougham automobile that appellees claim was repaired at the special instance and request of the appellant, made by its agent Martin, on or about November 2, 1926. A jury trial was had with a finding in favor of appellees for \$577.45, on which judgment was rendered and the appellant prosecuted this appeal.

The declaration consists of the common counts for goods, wares and merchandise sold and delivered; for money lent and advanced; for money paid out and expended; for money had and received to and for the use of the plaintiffs; for money due for interest and forbearance; for labors, services and materials; and for balance due on account stated. Affidavit of claim was attached to the declaration showing plaintiffs demand at \$577.45 being the reasonable and customary costs for repairing one Richenbacker Brougham automobile, repaired at the special instance and request of the defendant, made on or about the 2nd day of November, 1926, as the result of and being damaged in a fire at Thomas Calderotto's garage, on or about October 31st, 1926; and for storage on said automobile subsequent to January 2nd, 1927,

the date of the completion of said repairs, at the rate of \$10.00 per month.

To the declaration the defendant pleaded the general issue. Affidavit of merits attached to the plea of the general issue and the affidavit made by William B. Rearden, in which he stated that he is the state agent of the Camden Fire Insurance Association, the above named defendant, for the state of Illinois, and in charge of the business of the said defendant in the state of Illinois; that he verily believes that said defendant has a good defense to said suit upon the merits to the whole of plaintiff's demand.

The affidavit further states that the nature of said defense is as follows; that the plaintiffs did not repair or store a Richenbacker Brougham automobile at the special instance and request of this defendant, or any one authorized to act for this defendant, and that neither this defendant nor any one authorized to act for it, in that behalf, requested or authorized plaintiff to repair a Richenbacker Brougham automobile at any time.

The record discloses that prior to October 31, 1926, Tom Calderotto owned and operated a garage in the city of Rockford, known as the "E. C. Garage." The cars of this garage belonging to Calderotto, were insured against loss and damage by fire, by the defendant. During the night of October 31st, 1926, there was a destructive fire in this garage and several cars were damaged, among them the Richenbacker Brougham claimed by Calderotta as his property.

F. H. Andrews and E. A. Andrews, co-partners, as the Andrews Agency, contracted with the defendant as insurance solicitors only. On November 1, 1926 Calderotta notified the Andrews Agency of the fire and one of the parties of the firm communicated with William H. Reader, state agent, at its Chicago office, and was advised by Reader that he would have Mr. Martin at Rockford on the

the date of the completion of said repairs, at the rate of \$10.00

per month.

To the defendant, the following is stated:

Allegation of injury sustained by the plaintiff, the defendant

states that the injury was made by William A. Anderson, the plaintiff

stated that he is the owner of the property, the defendant

Association, the above named defendant, the plaintiff

and in terms of the business of the plaintiff, the defendant

of Illinois; that he verily believes that said defendant has a

good defense to said suit upon the merits of the case at plaintiff's

demand.

The plaintiff further states that the nature of said

defense is as follows; that the plaintiff has not shown to whom

a reasonable person would be liable for the injury sustained and

request of this defendant, or any one authorized to act for

this defendant, and that said defendant is not liable for the injury

said to act for it, in that said defendant is not liable

plaintiff to require a reasonable person would be liable for the injury

The plaintiff further states that the nature of said

from defendant's point of view, the plaintiff is not liable for the injury

and, known as the "U. S. Express". The nature of this injury is as follows:

and to defendant, were injured and lost and damaged by

first, by the defendant. That the nature of the injury is as follows:

there was a defective fire in this house and several persons were

damaged, among them the defendant's property, which is as follows:

as his property.

1. A. Anderson and W. A. Anderson, co-defendants, as the

And two persons, mentioned in the defendant's complaint, as follows:

only. On November 1, 1900, defendant's property, which is as follows:

of the fire and one of the persons of the fire, mentioned in the

William A. Anderson, also named, as the Chicago Express, and was

damaged by reason of the fire, which is as follows:

next day, the second of November. Martin, it is insisted by the appellant was a private or independent adjuster, connected with the Martin Adjusting Company; that the Andrews Agency and Harry B. Wells, one of appellees, knew that Martin was an independent adjuster, connected with the Martin Adjustment Company. Appellees contend that the record ²does not show that he was simply a private or independent adjuster.

Martin, whatever his capacity, was that is whether or not he acted in his capacity as private and independant adjuster, or otherwise, was present under the direction of the defendant company, to adjust the loss.

It appears that Andrews and Martin went to the garage in question and examined the property therein contained, and looked over the situation generally. Mr. Wells of the firm of appellees, who was engaged in repairing automobiles, Mr. Schurman, who was engaged in painting automobiles, and a Mr. Sutton, who is engaged in repairing automobile tops and trimmings, were called in for the purpose of estimating the damage done to the cars by the fire, including damage done to the Rickenbacker Brougham, involved in this case. The Rickenbacker Brougham was repaired by appellees.

The question involved in this case is whether or not Martin was authorized to act for the defendant (appellant here), in the repairs to said automobile and requested the plaintiffs to repair the same? It is the contention of the appellant Calderotta, and not Martin, the adjuster, gave appellees the job of repairing the Rickenbacker Brougham.

It is the contention of appellees that Martin ordered the repairs to be made, and that he was the agent of the company in doing so, and for that reason appellant should be required to pay for the repairs. A number of reasons are assigned for reversal of the judgment.

next day, the second of November. Further, it is pointed out that
agreement was a matter of consequence, and that it was
the main reason for the delay; that the delay was not
E. J. Kelly, one of the officials, that that delay was an intentional
delay, connected with the main subject of the case. It is
contended that the delay was not intentional but was due to a
misunderstanding of the law.
on the second of November.
The delay, however, was not intentional, and that is what
or it is noted in his capacity as a private and confidential adviser,
or otherwise, was present during the discussion of the subject
company, to adjust the law.
It appears that the delay was not intentional but was due to a
misunderstanding of the law. The delay was not intentional, and that
over the subject of the law. It is noted that the delay was
who was called in to adjust the law, and that the delay was
called in to adjust the law, and that the delay was
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the purpose of adjusting the law, and that the delay was
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this case. The delay was not intentional but was due to a
The delay was not intentional but was due to a
and that the delay was not intentional but was due to a
the delay was not intentional but was due to a
of the law.

In view of the conclusion we have reached, we will not enter upon any discussion of what the testimony discloses, other than to say that it was a controverted question as to whether or not Martin, the adjuster, was authorized to enter into a contract for the making of the repairs to the Rickenbacker Brougham automobile.

The record discloses that upon the trial of the case on the part of appellees, the following instruction was given to the jury, "The court further instructs the jury that an agent may bind his principal within the limitations of the authority with which he has been clothed in regard to the subject matter of his agency, and that if the jury find from the evidence that Mr. Martin was the duly authorized agent for the defendant, and he requested or authorized the plaintiff to repair the Rickenbacker Brougham then the defendant is liable for the reasonable cost of the repairs." It is said by the appellant that the first portion of this instruction does not mean anything, in so far as this case is concerned; that the last part of it, namely, "If the jury find from the evidence that Mr. Martin was the duly authorized agent for the defendant, and he requested or authorized the plaintiff to repair the Rickenbacker Brougham, then the defendant is liable for the reasonable cost of the repairs," took the entire case from the jury so far as the alleged contract upon recovery is sought, is concerned.

It was conceded that the case was tried on the theory that Martin was an adjuster, delegated by the defendant association to adjust the loss occasioned by the fire in question. He was of course, "the duly authorized agent" for the appellant for that purpose. That he had authority to enter into the alleged collateral contract with appellees, was not only not conceded but it was the chief matter of contest in the case. Although this being the fact,

In view of the fact that the defendant is a minor, it will

not be proper to allow him to be tried by a jury of his peers.

It is also to be noted that the defendant is a minor, and it is

therefore not proper to allow him to be tried by a jury of his peers.

A further fact is that the defendant is a minor, and it is

therefore not proper to allow him to be tried by a jury of his peers.

The result of the trial is that the defendant is a minor, and it is

therefore not proper to allow him to be tried by a jury of his peers.

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It is also to be noted that the defendant is a minor, and it is

the instruction told the jury that if they found from the evidence that Martin was acting as the agent of the defendant in any capacity, no matter how limited, then the defendant would be liable to the plaintiff, if the jury believed that he, Martin, requested or authorized the plaintiffs to repair the car in question. The instruction omitted a very important and essential element that the jury must find from the evidence that Martin was authorized by the defendant to enter into a contract to have the Richenbacker car repaired. The element omitted from this instruction is found in instruction 3, given on the part of appellars.

An instruction which directs the return of a particular verdict is fatally erroneous, if it omits an element essential to a recovery, and an instruction from which such omission is made cannot be cured by other given instructions, even though they are correct. *Cromer vs. Borders Coal Co.* 246 Ill. 451; *Bank of Commerce vs. Elkins* 214 Ill. App. 417.

We believe the giving of instruction No. 2 was erroneous; that it took away from the jury the consideration of the question as to whether or not Martin was authorized by the defendant to enter into a contract to have the Richenbacker Brougham repaired. For that reason, without discussing any other point in the case, we think the judgment of the circuit court should be reversed and the cause remanded, which is accordingly done.

Reversed and remanded.

STATE OF ILLINOIS,

} ss.

SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 L.A. 659⁴

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 8 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

M. L. MILLER, DOING BUSINESS
AS M. L. MILLER SALES COMPANY.
APPELLANT

V S.

ILLINOIS CENTRAL RAILROAD
COMPANY, A CORPORATION.
APPELLEE.

APPEAL FROM THE CIRCUIT COURT
OF WINNEBAGO COUNTY

Jett. J.

The record in this proceeding discloses that on May 4th, 1926, M. L. Miller, doing business under the style of M. L. Miller Sales Company, appellant, was engaged in selling automobiles in the city of Freeport and vicinity. On said day one Roy E. Long then in the employ of appellant, and in the performance of his duties as such employe, while driving an automobile on to a highway crossing over the tracks of the Illinois Central Railroad Company, appellee, near the city of Freeport, was killed as the result of a collision between the automobile and the locomotive of appellee, which was pulling a train of cars, which train, it is insisted was engaged in interstate commerce.

At the time of the collision and death of the decedent the appellant employer, and the said Roy E. Long were bound by, and operating under the provisions of the Workman's Compensation Act of Illinois.

The record further shows that Roy E. Long left him surviving Bertha C. Long, his widow, and one child, Eunice G. Long. The widow agreed to receive compensation payments from the appellant under the Workman's Compensation Act, as found and determined by the Industrial Commission. This suit was instituted by appellant, the employer, against appellee, to recover by way of subrogation from appellee, damages to the next of kin of the decedent, resulting from alleged negligence on the part of appellee in the operation of its train.

The declaration consists of one count and contains the averment that the plaintiff, appellant here, the employer, and Roy E. Long, were, at the time of the accident, bound by the terms and provisions of the Workman's Compensation Act.

To the declaration appellee pleaded the general issue and a special plea. By its special plea appellee avered that the train which struck and killed Roy E. Long was then engaged in interstate commerce between the states of Iowa and Illinois; that it had never elected not to be bound by the Workman's Compensation Act, and hence Miller, plaintiff, was not entitled to subrogation under said section 29 of the Compensation Act. To the special plea appellant interposed a demurrer, which, upon argument, was by the court overruled. Appellant elected to stand by his demurrer and was defaulted for want of a replication to the special plea, and judgment in bar and for costs was entered against him. From which judgment this appeal is prosecuted by appellant. The only question involved is, did the trial court err in sustaining the special plea?

The appeal in this case was originally taken to the Supreme Court but was transferred by that court to this court.

Appellant urges that a constitutional question is involved, and in effect, says that if the provisions of Section 29 are to be construed as the same were construed by the trial court, then the act constitutes class legislation and is void. To this argument we can give no consideration because this court must assume that the act is valid, and with such assumption we must look to its terms for its meaning.

The provisions of Section 29 of the Workman's Compensation Act, under which appellant claims his right of action by way of subrogation, are as follows: First, that the injury or death of the employee was not proximately caused by the negligence of the employer or his employees.

The defendant complains of the error and contends the
evidence was the plaintiff, defendant, and
that it was, at the time of the hearing, known by the jury
and provisions of the defendant's constitution.

To the defendant's appeal, the plaintiff
issues and a special appeal. The defendant's appeal was
the first appeal and the first appeal was the first
appeal between the state of Iowa and Illinois. The
it was never stated and so the defendant's constitution
Act, and hence Miller, plaintiff, was not entitled to a
under said section 23 of the defendant's constitution. The
plaintiff's appeal is a defendant's appeal, and so the
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was stated for each of a defendant's appeal, and
judgment in the first appeal was not entitled to a
judgment in the first appeal is a defendant's appeal. The
involved in, in the first appeal, is a defendant's appeal.

The appeal in this case was originally taken to the
Supreme Court and was remanded to the first appeal.

Appellant argues that a constitutional question is
involved, and in effect, that the defendant's appeal is
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appeal.

Second, That the circumstances creating the legal liability for damages were occasioned by some person other than employer, and Third, that such other person had elected not to be bound by the Compensation Act. It will therefore be seen that the third provision of Section 29 of the Compensation Act, as above set out, clearly and expressly makes it a condition precedent to the right of subrogation, that the third person, causing the injury or death, shall have elected not to be bound by the Workman's Compensation Act.

A number of cases are cited bearing upon the questions involved, both by the appellant and the appellee. We do not deem it necessary in view of the conclusion we have reached, to enter upon a discussion of the authorities relied upon by the respective parties, but content ourselves by saying, -first, appellant cannot invoke against appellee, any provision found in the Compensation Act, as the Act has no application whatever to appellee while engaged in interstate commerce. Second, Under the express provision contained in the third clause of Section 29, the cause of action against a negligent third party, vested in an injured employee, or his legal representative, is transferred to the employer of such employee only in cases where the negligent third party possesses the right to elect to be bound or not to be bound by the Act. Appellee having been engaged in interstate commerce, at the time of the death of Long, possessed no such power to elect.

We conclude therefore that the trial court committed no error in overruling the demurrer to the special plea. The judgment of the circuit court of Winnebago County will be affirmed.

Judgment affirmed.

[illegible]

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STATE OF ILLINOIS,

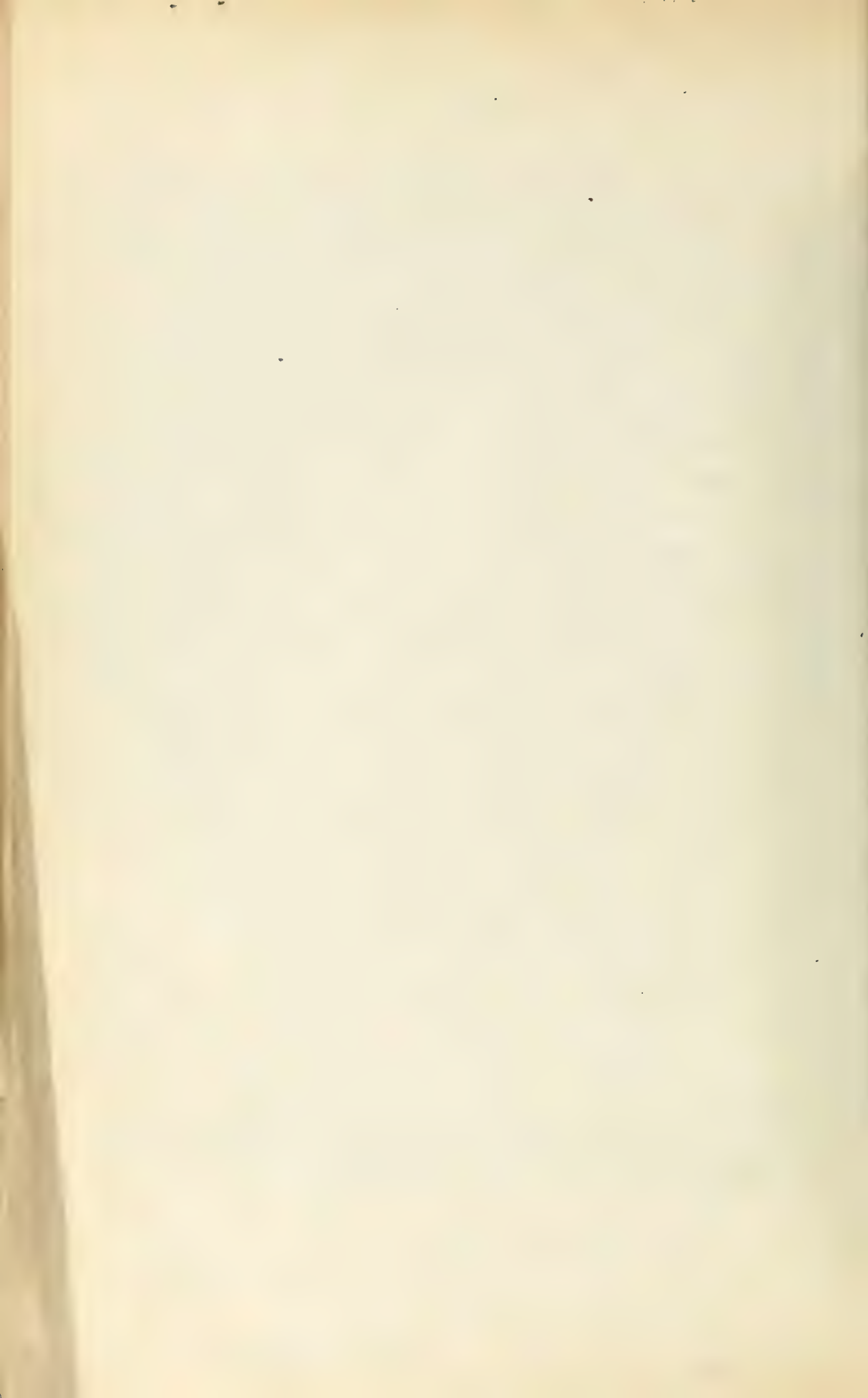
SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court



Not track

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 660¹

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 8 1928 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

JOHN SEVERSON,

Appellee,

VS

APPEAL FROM GRUNDY.

THE AMERICAN INSURANCE COMPANY,

Appellant.

Jett, J.

This is an appeal by The American Insurance Company, appellant, from a judgment for \$2181.00 in a suit on a policy of fire insurance against it and in favor of John Severson, appellee. A jury trial was had and at the close of all of the evidence the court directed a verdict and rendered judgment thereon for said sum and this appeal by the appellant followed.

For the purposes of this opinion John Severson, appellee, will be called plaintiff and The American Insurance Company, appellant, will be called the defendant.

The record discloses that the suit was brought for the loss of certain personal property located on a farm in Vienna township, Grundy County, upon which the plaintiff was a tenant. The property, it appears, was destroyed by fire on August 4th, 1924.

The declaration contained two special counts and the common counts. The first special count declared upon the policy of insurance and charged that on April 7th, 1924, appellee executed his note by which he promised to pay the defendant \$101.40 on July 15th, 1924, and that thereafter on the same day for a valuable consideration the defendant extended the time of payment of said note to the 15th day of August, 1924. The second special count also declared upon the policy of insurance and alleged that the plaintiff had kept and performed all of the conditions of the policy.

To the declaration the defendant pleaded the general issue and a special plea setting up the condition of suspension in the

JOHN DEWITT

Appellee,

VS

THE AMERICAN INSURANCE COMPANY,

THE AMERICAN INSURANCE COMPANY,

Appellant.

Left, 1.

This is an appeal by The American Insurance Company, appellant, from a judgment for \$100.00 in a policy of fire insurance against it and in favor of John DeWitt, appellee. A jury trial was had and at the close of all of the evidence the court directed a verdict and rendered judgment for said sum and this appeal by the appellant followed.

For the purpose of this opinion the following facts, which will be called Plaintiff and The American Insurance Company, appellant, will be called the defendant.

The record discloses that the suit was brought for the loss of certain personal property located on a farm in Adams Township, Grundy County, upon which the Plaintiff was a tenant. The property, it appears, was destroyed by fire on January 2nd, 1924. The declaration contained the special counts and the common counts. The first special count declared upon the policy of insurance and showed that on April 7th, 1924, appellee executed his note by which he promised to pay the defendant \$100.00 on July 1st, 1924, and that thereafter on the same day for a valuable consideration the defendant extended the time of payment of said note to the 1st day of August, 1924. The second special count also declared upon the policy of insurance and alleged that the Plaintiff had paid and performed all of the conditions of the policy.

To the declaration the defendant pleaded the general issue and a special plea setting up the condition of payment in the

application, policy and note; denying that the time of payment of the note was extended and alleging that the note was not paid when due on July 15th, 1924, and the policy was not in force or effect at the time of the loss.

Replications were filed setting up that at the time of the making of the note and again after the delivery of the policy and prior to the maturity of the note the defendant stated to the plaintiff that the note would be extended for thirty days and that it was unnecessary to pay the note at maturity; that payment of the note was tendered prior to its maturity and that the plaintiff relied on said statements and did not pay the note until August 6th, 1924, after the fire.

Rejoinders were filed denying the statements set forth in the replications; denying tender of payment and denying any authority of the defendant's agent to extend time of payment or make any representations or statements on behalf of the defendant.

The premium note given in payment of the policy was past due and unpaid at the time of the loss and for this reason it is the contention of the defendant that by the terms of the application the policy and the note suspended the insurance. The principal question involved, therefore, is whether or not the time of payment of the note had been extended or the default in payment waived.

The following condition appeared in the application for the insurance, the note and the policy. It reads as follows:

"It is expressly agreed that this company shall not be liable for any loss or damage that may occur to the property herein mentioned, while any note or part thereof, or order given for the premium, remains past due and unpaid and in case of default in the payment at maturity, of any note or part thereof or order given for the premium, the premium shall be deemed fully earned and shall at once be due and collectable and the collection, whether by legal process or otherwise, payment or receipt of payment thereof, shall in

the time of the loss.

On said statements and all that was said will appear in the 1934, note was prepared prior to the meeting and was the substance of the it was unnecessary to pay the cost of delivery; that payment of the Plaintiff that the note would be assigned to Plaintiff here and that and prior to the maturity of the note the Plaintiff stated to the the making of the note and made after the delivery of the letter To said the Plaintiff were filed nothing up and at the time of

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The preceding note given in payment of the balance was
greatly increased at the time of the loan and the balance is
the continuation of the statement that in the course of the application
the policy and the note suggested the insurance. The principal
question involved, therefore, is whether or not the line of interest
of the note had been extended on the account in payment of interest.
The following conditions appeared in the application for
two insurance, the note and the policy. It reads as follows:

[illegible]

no case revive or create any liability against this company for loss occurring while the assured was so in default. The payment of the premium in full, however, revives the policy and makes it good for the balance of its term. In case of loss prior to the maturity of any note or notes, or part thereof given for premium on this policy, the same shall become due and payable and may be deducted from the amount of said loss."

It was further stipulated in the policy that, "no agent or employee of this company or any other person or persons except the western manager, in writing, shall have power or authority to waive or alter any of the terms or conditions of this policy." Endorsed on the back of the policy was the following: "Notice to policy holders: Agents of this company are not authorized to waive or alter any of the terms or conditions of this policy."

This cause was in this court at a former term, at which time it was reversed for the giving of certain instructions having to do with the matter of the extension of the time of the payment of the note in question and for certain inflammatory language used by counsel for the plaintiff in the closing argument. The facts in the case were at that time set forth in the opinion and it will not be necessary for us to repeat them here.

On the former trial this court held that while there was no evidence of the extension of the note there was evidence tending to show that the time of payment of the note was waived and also that Darling the agent, was a general agent whose authority would warrant the waiving the payment of the note at the time it fell due and that these were questions of fact for the jury. The court at the trial from which this appeal is prosecuted directed a verdict in favor of the plaintiff and did not submit to the jury the question as to whether or not Darling was a general agent and having authority to waive the time of the payment of the note and as to whether or not there was evidence in the record which would

no case revive or exercise any liability against this
company for late payment of the amount due as
in arrears. The payment of the amount due as
in arrears shall be made by the company on
the date of the receipt of the amount due as
in arrears. In case of late payment of the
amount due as in arrears, the company shall
be liable to pay the amount due as in arrears
and any interest thereon from the date of late payment.

It is further stipulated in the contract that the

amount of the interest on the amount due as in arrears

shall be calculated at the rate of five per cent per annum

and the company shall be liable to pay the amount of the

interest on the amount due as in arrears on the date of

the receipt of the amount due as in arrears and any

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interest thereon from the date of late payment of the

amount due as in arrears and any interest thereon

warrant the jury in finding that the payment of the note at the time stated was waived. By the action of the court in directing a verdict these questions of fact were taken from the consideration of the jury.

For the reasons above set forth the judgment of the trial court is reversed and the cause remanded.

Reversed and remanded.

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For the reason above and that the interest of the

will come to be reversed and the work of the

forward the lady.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court



abstract

AT A TERM OF THE APPELLATE COURT,

6877a
Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 680²

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 20 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

THE PEOPLE OF THE STATE OF
ILLINOIS, FOR THE USE OF COM-
MUNITY HIGH SCHOOL DISTRICT NO.
195, HENRY COUNTY, ILLINOIS,
Appellant,

APPEAL FROM THE CIR-
CUIT COURT OF
HENRY COUNTY.

v.

A.E. ANDERSON, PHILLIP BRODD,
TITUS SAMUELSON, CHARLES N. ENGNELL :
and LUTHER HULTGREN, :
Appellees,

JONES P.J.

Appellees were formerly members of the board of education of Community High School District No. 195 of Henry County. An action of assumpsit was brought against them by appellant to recover certain funds alleged to have been in the care, custody and control of appellees while they were members of said board of education, and to have been unlawfully squandered by them.

The declaration contains one special count and the common counts. To the special count a general demurrer was filed and sustained by the court. Plaintiff withdrew the common counts and elected to stand by the special count. Thereupon the court entered judgment against appellant and this appeal is prosecuted.

The special count averred that appellees, while members of said board of education came into the custody of large sums of money, securities and property belonging to the school funds of said district to the amount of \$50,000 which amount was changed from time to time as the taxes and proceeds from the sale of bonds of the district were added and as money was withdrawn therefrom on warrants; that such school funds were a part of the township fund of Andover township; that appellees at various times, unlawfully, improperly and contrary to the statute, paid out and squandered \$15,000 of such funds for

THE PEOPLE OF THE STATE OF
ILLINOIS, FOR THE YEAR 1900
COUNTY OF DECATUR, DISTRICT NO. 1
1900, COUNTY OF DECATUR, ILLINOIS
Appellants.
v.
J. E. ALLEN, JAMES H. HARRIS,
JAMES HARRIS, GEORGE E. HARRIS,
JAMES HARRIS, GEORGE E. HARRIS,
JAMES HARRIS, GEORGE E. HARRIS,
Appellees.

JAMES H. HARRIS.

Appellants were formerly members of the board of
education of Decatur High School, located on the corner of
County. An action of assumpsit was brought against them by
appellees to recover certain funds alleged to have been in the
care, custody and control of appellees which had been wrongfully
of said board of education, and to have been wrongfully with-
drawn by them.

The following facts are stated in the complaint and are
common to all. To the special court a formal complaint was
filed and sustained by the court. Judgment against the common
counts and elected to stand by the special court. Thereupon
the court entered judgment against appellees and this appeal is
presented.

The special court entered judgment against appellees, to the
members of said board of education some time prior to the date of
large sums of money, securities and property belonging to the
school funds of said district in the amount of \$10,000 which
amount was changed from time to time as the same and proceeds
from the sale of some of the lands were added and as money
was withdrawn therefrom on various dates; and such money funds were
a part of the township fund of Anderson township; that appellees
at various times, unlawfully, illegally and contrary to law
stole, took and converted said \$10,000 of said funds for

litigation, attorney's fees, architects, contractors, well drilling, printing, interest on bonds, compensation and expenses of members of said board, rent, labor, board, purchase of lands and for other improper and unlawful purposes, while they knew or should have known that such payments were improper and contrary to the provisions of the statute.

The special count also averred that said sums of money were improperly paid out of the school fund of said district and unlawfully expended and misappropriated in and about the preparation for and in building a school house on the public square in the Village of Andover, where they had no right to build; also in purchasing land for a playground before a school house site had been selected,-- in the payment of attorney's fees and court costs in quo warranto proceedings testing their title to office as members of said board of education, and in the payment of interest on bonds, rent, etc., without a prior meeting of the board.

The suit is based on Section 264 of the School Act of 1909, (Chap. 122, Sec. 264, Rev. Stat. 1927), and appellant's right of recovery depends upon the interpretation given to that section. In the year 1909 the General Assembly passed an Act revising the school law. (Laws 1909 p. 410;) Section 264 of that Act is still in force and is as follows:

"County superintendents, trustees of schools, township treasurers, and directors or either of them, or any other officer having charge of school funds or property, shall be pecuniarily responsible for all losses sustained by any county or township fund by reason of any failure on his or their part to perform the duties required of him or them by the provisions of this Act, or by any rule or regulation authorized to be made by the provisions of this Act, and each and everyone of the officers aforesaid shall be liable for any such loss sustained as aforesaid, and the amount of such loss may be recovered in a civil action brought in any court having jurisdiction thereof, at the suit of the State of Illinois, for the use of the county, township or fund injured; the amount of the judgment obtained in such suit shall, when collected,

be paid to the proper officer for the benefit of the county, township, or fund injured."

Section 77 of the School Act of 1857 (Laws 1857 p. 291) and as included in the revision of 1872 (Laws 1872, p. 700,) provided:

"County superintendents, trustees of schools, directors, and township treasurers, or either of them, and any other officer having charge of school funds or property, shall be responsible for all losses sustained by any county, township OR SCHOOL fund, by reason of any failure on his or their part to perform the duties required of him or them by the provisions of this act,"

By the 1909 Act the word "school" where shown above in capitals, was omitted, and the word "or" above shown in capitals, was moved from after the word "Township" to immediately before that word. The remainder of the section, with slight changes in the phraseology by the general revision of the School Act in 1889, (Laws 1889, p. 256.) is substantially the same as Section 264 of the 1909 Act. No substantial change in the terms of this Section was made until the Act of 1909 was passed.

Appellees contend that by the Act of 1909 the right to maintain an action in the name of the state for the use of the school fund was abolished and that liability for misappropriation of funds is now limited to losses sustained by county or township funds only. But appellant contends that Section 77 of the Act of 1857 is identical in meaning with Section 264 of the Act of 1909.

While the county fund and township fund, as used in the School Act, may be said to be school funds in a general sense, it cannot be said that all school funds are either county funds or township funds. The principal of a township fund is derived from the sale of common school land, etc. No part of the principal may ever be expended, but the interest, rents, issues and profits only may be distributed for school

1. The first part of the report is a summary of the work done during the year. It is divided into two main sections: a general summary and a summary of the work done in each of the four departments. The general summary is divided into three parts: a summary of the work done in the field, a summary of the work done in the laboratory, and a summary of the work done in the office. The summary of the work done in each of the four departments is divided into two parts: a summary of the work done in the field and a summary of the work done in the laboratory. The summary of the work done in the field is divided into three parts: a summary of the work done in the field, a summary of the work done in the laboratory, and a summary of the work done in the office. The summary of the work done in the laboratory is divided into two parts: a summary of the work done in the field and a summary of the work done in the laboratory. The summary of the work done in the office is divided into two parts: a summary of the work done in the field and a summary of the work done in the laboratory.

in the terms of this Section was made until the day of 1932
the same as Section 104 of the 1922 Act. It was amended in
1908 and in 1917 (Law 1917, c. 221) in substantially
the same form as the present Section 104 of the
Act of 1922. The Commission of the Senate, with the
Senate, was moved from 1917 to 1922, in 1922
in 1922, was amended, and the Act of 1922, which is
of the Act of 1922, was amended, and the Act of 1922, which is

[illegible]

This is a very good example of a letter from a woman to a man. The letter is written in a very simple and direct style, and it is very easy to read. The woman is telling the man that she is very happy to hear from him, and that she is looking forward to seeing him soon. She is also telling him that she is very busy at the moment, but that she will try to write to him again soon. The letter is a very good example of a personal letter, and it is very easy to see why it is so popular.

expenses. (Sec. 216 Act of 1909.) The principal of the county fund is added to the principal of the township fund, and the interest, etc., may likewise be distributed. (Sec. 215 Act of 1909.)

The school district fund must not be confused with the township fund. The school fund of a school district is no part of the township fund. There is no averment in the declaration sufficient to charge that the funds alleged to have been squandered were in fact any part of the township fund. Section 264 of the Act of 1909 imposes pecuniary responsibility for losses sustained by the county or township fund only. The question, then, to be determined is whether or not it embraces, by necessary implication, losses from school funds of a school district.

Although courts are required to give all words, clauses and phrases found in laws a liberal construction, to carry out the legislative intent, they have no power to inject provisions into the statute which were omitted by the law makers. (Richmond v. Moore, 107 Ill. 429.) The words of a statute will be interpreted according to their common and popular acceptance and import, unless that interpretation will defeat the manifest intent of the legislature. The legislative intent must necessarily be gathered from the words used. (Barnes v. Chicago 323 Ill 203.) We must not import into an act a condition or qualification which we do not find there. (Steere v. Brownell 124 Ill. 27; City of Clinton v. Wilson 257 id. 580.) If the words embody a definite meaning, which involves no absurdity, and no contradiction between different parts of the same writing, then that meaning, apparent upon the face of the statute, is the one which alone courts are at liberty to say was intended to be conveyed. (City of Beardstown v. City of Virginia 76 Ill. 34; City of Chicago v. McCoy 136 id. 344.)

The section of the statute in question is penal in

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[illegible]

The following is a list of the names of the persons who have been appointed to the various committees of the Senate, together with the names of the persons who have been appointed to the various committees of the House of Representatives, and the names of the persons who have been appointed to the various committees of the Supreme Court.

its character. (Vestal Co. v. Robertson 277 Ill. 425.) Such statutes are by well settled principles of law, to be strictly construed, and matters and things which are not included cannot be brought within the operation of such statutes by mere construction. (C.R.I. & P. Ry. Co. V. People 217 Ill. 184.)

It is not be presumed that the legislature made a definite change in the section in question inadvertently. The omission of the word "school" before the word "fund" and the moving of the word "or" to a place between the words "county" and "township" show a definite intent of the lawmakers to change the law and its effect. The meaning is plain and we are of the opinion that the liability imposed by Section 264 does not include such losses as are averred by the declaration in this cause. The demurrer was properly sustained and the judgment of the circuit court is affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

Callag Lane

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 660³

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 20 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



| | | |
|---------------------|---|--------------------|
| ALMIRA M. MARSHALL, |) | |
| Appellee, | : | |
| |) | |
| v. | : | Appeal from the |
| |) | Circuit Court of |
| WILLIAM G. BOEKE, | : | Stephenson County. |
| Appellant, |) | |

Jones P.J.

The plaintiff, Almira M. Marshall, brought suit against the defendant, William G. Boeke, on a note for \$2500 and interest. A demurrer was sustained to the original declaration and an amended declaration was thereafter filed. A general demurrer to such declaration was overruled and the defendant elected to stand by his demurrer. Thereupon judgment was rendered in favor of the plaintiff for \$2902.91 and costs. This appeal followed.

The amended declaration avers that on March 3, 1920 plaintiff loaned \$2500 to Charles J. Wilson and Robert F. Marshall, as evidenced by a promissory note of that date, executed by them and also by Florence Wilson and Blanche Marshall, payable to the order of themselves five years after date and endorsed by the makers to plaintiff, and that the note is secured by a trust deed of even date to Herbert D. Crumb as trustee. The note and trust deed are set out in haec verba, and the trust deed states that it is given to secure an indebtedness upon two notes of \$2500 each.

The declaration avers that the note sued on is one of the notes mentioned and described in the trust deed; that, on the day the trust deed was executed, the note was endorsed and delivered to plaintiff, who has ever since been its owner; that on December 7, 1920, the premises were conveyed to the defendant by a warranty deed, which contains the following:- "Subject to a certain trust deed securing the sum of five thousand dollars (\$5,000) which is a lien upon said premises

Appeal from the
District Court of
Washington County.

ALBION M. BARNETT,
Appellant,
v.
WILLIAM A. BARNETT,
Appellee.

June 1, 1900.

The plaintiff, Albion M. Barnett, brought suit against the defendant, William A. Barnett, on a note for \$1000 and interest. A judgment was rendered in the original action in favor of the plaintiff for \$1000 and interest. The defendant appealed from that judgment. The case was argued and the court rendered a judgment in favor of the plaintiff for \$1000 and interest. This appeal followed.

The amended declaration states that on March 2, 1900, plaintiff loaned \$1000 to Charles F. Wilson and Robert W. May, as evidenced by a promissory note of that date, executed by them and also by Thomas Wilson and Thomas May, payable to the order of plaintiff five years after date and secured by the notes to plaintiff, and that the note is secured by a first lien of every kind on Robert W. May's property. The note and first lien are set out in Exhibit A, and the court declared that it is given to secure an indebtedness upon two notes of \$1000 each.

The defendant avers that the note was in full of two notes mentioned and described in the first exhibit, that on the day the first bond was executed, the note was assigned and delivered to plaintiff, who has ever since held the same; that on December 7, 1900, the plaintiff was conveyed to the defendant by a mortgage deed, which contains the following "Subject to a certain first lien securing the sum of five thousand dollars (\$5,000) which is a lien upon said premises

which, together with the interest thereon subsequent to the 15th day of July A.D. 1920, the grantee hereby assumes and agrees to pay as part of the consideration and purchase price of this transaction."

The declaration also avers that by reason of the covenants of said deed, the defendant assumed and agreed to pay the indebtedness owing to plaintiff by Marshall and Wilson, as evidenced by the aforesaid promissory note, and that the defendant accepted the said deed with full knowledge that he thereby assumed such obligations, and thereafter paid the interest on said note until March 3d, 1925.

It is contended that the declaration does not contain any averment of a direct or implied promise by the defendant to the plaintiff to pay said note. And it is also contended that the declaration does not sufficiently identify the note sued on as being one of the notes mentioned in the trust deed; that it does not aver that the plaintiff ever made a demand on the defendant for payment; and that it does not aver that the defendant had notice or knowledge of the plaintiff's ownership of the note.

It is well settled that where a grantee accepts a deed containing a provision by which he agrees to assume and pay an existing encumbrance on the premises as a part of the consideration, he becomes personally liable to the holder of the encumbrance for the payment of such indebtedness. The rule rests upon the doctrine that where one person, for a valuable consideration, makes a promise to another for the benefit of a third person, such third person may maintain an action upon it. It is not necessary in such a case that there should be a consideration moving from the third person, for whose benefit the promise is made, or that there should be any privity between them. (Dean v. Walker 107 Ill. 540; Bay v. Williams 112 id. 91; Webster v. Fleming 178 id. 140; Harts v. Emery 184 id. 560; Watts v. Killian 300 id. 242.)

which, together with the latter of various agreements in the
1st set of July A.D. 1920, the parties have agreed and
agree to pay as part of the consideration and purchase price
of this transaction.

The Association also agrees that it shall be bound by the
provisions of said bill, the parties hereto and agreed to
pay the consideration as aforesaid in consideration of the bill
as evidenced by the receipt of the parties hereto, and that the
defendant assigned the bill to the plaintiff and the plaintiff
transferred the bill to the defendant, and the defendant shall be bound
on said bill with the bill.

It is further agreed that the consideration shall be paid
in full payment of the bill on the day of the date of the bill
and the plaintiff to pay said bill. It is further agreed that
that the bill shall be paid by the plaintiff to the defendant
such as on the day of the date of the bill in the bill
that it does not mean that the plaintiff shall be bound
on the bill for payment; but that it shall be paid by the
the defendant and shall be paid to the plaintiff's
ownership of the bill.

It is also agreed that where a person assigns a
bill containing a provision for the payment of money and
pay an existing obligation of the bill as a part of
the consideration of the bill, the bill shall be paid by the
of the assignor to the payee of the bill. It is
further agreed upon the bill that where a person, for a
valuable consideration, assigns a bill to another for the
benefit of a third person, such third person may maintain
an action upon it. It is not necessary to show a bill
there exists a bill in the bill moving from the bill to the
for whose benefit the bill is made, or that there should be
any giving between them. (Case of Jones v. Smith, 1st set of
March 1st 1841, 1st set of March 1st 1841, 1st set of March 1st 1841,
v. Smith 1st 1841, 1st set of March 1st 1841, 1st set of March 1st 1841.)

In our judgment, the declaration is not lacking in definiteness. It specifically avers that the note sued on is one of the notes secured by the trust deed, and mentioned in it. It also avers that by the deed, Boeke assumed and agreed to pay the note and that he accepted the deed with full knowledge of his liability and thereafter paid plaintiff the interest due to March 3, 1925. The contentions of appellant cannot be upheld and the judgment of the circuit court is affirmed.

Judgment affirmed.

[illegible]

Journal of the American Medical Association

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 680⁴

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 20 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

| | | |
|---------------------------|---|----------------------|
| CARRIE ACKERSON, | : | |
| Appellee, | : | |
| | : | |
| v. | : | Appeal from the Cir- |
| | : | cuit Court of |
| JAMES G. TITLOW, Adminis- | : | Winnebago County. |
| trator of the Estate of | : | |
| Hiram Gitchell, deceased, | : | |
| Appellant, | : | |

JONES P.J.

Two claims were filed by appellee in the probate court against the estate of her deceased brother, Hiram Gitchell, one being for \$2926.74, and the other for \$300. They were treated as one claim and tried together. The larger claim includes various items of money and checks advanced by appellee to decedent, a promissory note for \$300 executed by decedent, room rent, charges for washing, mending, and grave markers. The other claim is for two checks given by appellee to decedent. On the hearing in the probate court without a jury, the item consisting of the note for \$300 was allowed in the sum of \$348.42, and all other items were disallowed. Claimant prosecuted an appeal to the circuit court, where the cause was tried before a jury. A verdict for \$2841.95 was returned in favor of the claimant, on which judgment was rendered. To reverse that judgment this appeal is prosecuted.

Hiram Gitchell was 67 or 68 years old at the time of his death in April, 1924. The record discloses that he was without money, but that he expected to receive a share of his mother's estate. For several years preceding his death he occupied a bedroom on the second floor of claimant's house. During the period covered by her claim she kept several other roomers. She did not furnish meals to her brother, but did his washing and mending. From time to time she let him have

cash and checks aggregating about \$2,000. She charged \$5.00 a week for 219 weeks or \$1095 for room rent, washing and mending.

In support of her claim for money advanced, she offered in evidence certain checks given by her to her brother, and it is insisted that the court erred in admitting them. Where one passes money or checks to another and there is no explanation of the cause of such payment, the presumption is that the money was paid because it was due and owing, and not by way of loan. (Brownell v. Estate of Brownell, 139 Ill. 424.) But this presumption is one of fact rather than one of law,-- a mere rule of evidence,--an inference to be drawn from the facts and circumstances of the particular case. Each case must be decided according to its own special facts. (Peabody Coal Co. v. Ind. Com. 289 Ill. 330.)

In re Moyle's Estate (Orph. Ct.) 7 Kulp, (Penna.) 215, it was held that the giving of plain checks raises a presumption that they were issued in payment of a debt, rather than one that they evidence loans from the drawer to the payee. But this presumption may be rebutted by evidence of the non-appearance of the checks in the payee's book account against the drawer, their endorsement to wholesale merchants from whom payee bought goods, and the fact that the payee was a retail merchant and did not loan money. The presumption may be overcome by proof of circumstances from which it may be fairly and reasonably inferred that the transaction was in fact a loan.

In the case at bar, the undisputed evidence shows that during a period of five years, preceding decedent's death, he made frequent applications to claimant for money to buy food and for other purposes. One of his sisters testified that she heard him tell claimant he intended to pay her back as soon as he received his money from his mother's es-

cash and checks amounting to \$1,000. The amount is, to
a great extent, the result of the fact that the
company.

In support of her claim for money advanced, she
offers in evidence certain checks which she says are proper,
and as indicated that the money was in fact advanced.
There are no other checks or bills or notes or any other
evidence of the fact of such payment. The presumption is
that the money was paid because it was the only way, and not
by way of loan. (Hawkins v. Brown, 100 Ill. 484.)
This is especially so in the case of a check, which is
a form of evidence, and is not a mere receipt for
funds and disbursement of the particular sum. Such cases are
decided according to the general rule. (Hawkins v. Brown, 100 Ill. 484.)

V. Ind. 100, 282 Ill. 484.)
In the case of a check, the fact that it is a check
itself is not sufficient to establish the fact of payment.
Presumption that the money was paid in payment of a debt, unless
there is some other evidence to show that the money was the
But this presumption may be rebutted by evidence of the non-
existence of the debt. In the case of a check, the fact that
the check is cashed and the money is received is not
sufficient to establish the fact of payment. The presumption may
be rebutted by proof of circumstances from which it may be
totally and reasonably inferred that the transaction was in
fact a loan.

In the case of a check, the fact that the money was
received is not sufficient to establish the fact of payment.
The fact that the money was received is not sufficient to
establish the fact of payment. The fact that the money was
received is not sufficient to establish the fact of payment.
The fact that the money was received is not sufficient to
establish the fact of payment. The fact that the money was
received is not sufficient to establish the fact of payment.

tate. Another witness testified to a number of conversations in which decedent said to claimant "Carrie, can you loan me some money?" One witness testified that decedent told claimant he was borrowing the money because he needed it. Witnesses saw claimant give decedent money and checks at different times, and testified that he promised to repay her.

In addition to the checks decedent obtained from claimant sundry small items of cash, ranging from \$1 to \$7. He kept an account of some portion of these payments covering a period of several months. She paid off a loan which he owed a man named Hogan. The record does not show as clearly as it might that the check she gave in payment of this loan, is one of those offered in evidence, however, the circumstance tends to rebut the presumption that the checks given by claimant to her brother were in payment of debts due him from her.

Decedent had no money and was dependent upon claimant to furnish him with a room and means of subsistence. There is nothing in the record which in any way tends to show that claimant was indebted to decedent. We are of the opinion that the testimony on behalf of appellee was sufficient to rebut the presumption relied on by appellant. The checks were properly admitted in evidence.

Appellant insists that the decedent was living in claimant's house as a member of her family, and that the services and the room furnished by her are presumed to have been furnished gratuitously. While the general rule is that such a presumption obtains where parties live together as members of one family, still it is equally well settled that compensation may be recovered, if a reasonable inference arises from the evidence that an understanding existed between the parties, by which the claimant was to receive pay for her services. A contract may be established by facts and cir-

cumstances in evidence which show that when the services were rendered, both parties expected them to be paid for, the one expecting to receive payment, and the other to make payment for such services. (Hudson ^{vs. Hudson} 218 Ill. App. 559.)

We are of the opinion that the evidence shows that claimant expected pay for the room occupied by her brother and for her services, and that he expected to pay her for them. The decedent did not take his meals at claimant's house, but ate elsewhere and borrowed money from her to pay for them. The evidence does not show that he was anymore a part of the family of appellee than were the other roomers in the house. He repeatedly told claimant he would pay her every dollar he owed her, and made the same statement to other witnesses. That the promises of decedent to pay his sister out of what he would receive from his mother's estate were made in good faith, and so accepted by her may be inferred from the fact that decedent's mother provided a legacy of \$10,000 for him in her will. She died about a year before his death. Under the facts in this record, it is evident that both parties expected the charges for room rent and attention to be paid.

We are of the opinion that the testimony was sufficient to support the verdict. The judgment is affirmed.

Judgment affirmed.

circumstances in evidence which show that when the services were rendered, both parties expected them to be paid for, and one expecting to receive payment, and the other to make payment for said services. (Exhibit 212 Ill. Ex. 107.)

We are of the opinion that the evidence shows that plaintiff expected pay for the room occupied by her brother and her services, and that he expected to pay for them. The defendant did not take this into consideration, and the plaintiff was not paid for her services. The evidence does not show that the plaintiff expected a part of the family of expenses from her other roomers in the house. He reasonably took plaintiff to be paid for every dollar he paid her, and made the same statement to other witnesses. That the promise of defendant to pay his share out of what he would receive from his sister's share were made in good faith, and as suggested by her may be inferred from the fact that defendant's mother provided a lawyer of \$10,000 for him in her will. She did not want a poor father's law. Under the facts in this case, it is evident that both parties expected the money for her room and attention to be paid.

We are of the opinion that the testimony was sufficient to support the verdict. The verdict is affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 660⁵

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 28 1928 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

| | | |
|---------------------------------|---|-------------------------|
| HARRY KLUK and JOE LOWY, | : | |
| a co-partnership doing business | : | |
| as ELITE FRUIT MARKET, | : | |
| Appellees, | : | APPEAL FROM THE CIRCUIT |
| VS | : | COURT OF LAKE COUNTY. |
| FRANK WEBBER, doing business | : | |
| as WEBBER CARTAGE LINE, | : | |
| Appellant. | : | |

Jett, J.

Harry Kluk and Joe Lowy, partners doing business under the name of Elite Fruit Market, appellees, brought suit in the Circuit Court of Lake County against Frank Webber doing business as Webber Cartage Line, appellant.

The declaration consists of three counts and charges that Frank Webber, doing business as Webber Cartage Line, appellant, was a common carrier for hire and was employed by appellees to haul certain vegetables and fruits from Chicago to appellees place of business in Waukegan, and each count charged in substance that the appellant accepted and received from appellees certain fruits and vegetables to be safely and securely carried and conveyed from the City of Chicago to the City of Waukegan, and to be safely and securely delivered to appellees for a reasonable reward; that the appellant by his servant so carelessly and negligently conducted himself in the premises that by and through the carelessness and negligence and improper conduct and fault of the appellant by his servant in that behalf the said vegetables and fruits became and were greatly injured, frozen and damaged.

Appellees suit was instituted February 14th, 1925. The record discloses that at the March Term 1925 of said court, the appellant appeared by his attorney one Patrick J. Kelley

and filed a plea of the general issue. The cause was not tried during the term and was continued from term to term either by agreement of the parties or by reason of no action having been taken by either party during these terms to dispose of the cause. At the May Term 1927 appellees upon request were given leave to amend their declaration. No amendment appears to have been made however. A jury trial was had at said May term 1927, which resulted in a verdict in favor of appellees in the sum of \$972.25, upon which the court, after overruling motions for a new trial and in arrest of judgment, entered judgment. It is from this judgment that the appellant prosecutes this appeal.

After the filing of the plea of the general issue by Patrick J. Kelley who appeared for the appellant he made no further appearance in the cause and Okel S. Fuqua appeared thereafter for the appellant. On the trial of the cause the defense which was sought to be interposed was that there was no contractual relationship between appellees and the appellant, and that the appellant was not employed by appellees to transport the goods in question; that appellant had declined such employment; that the appellees employed another and a different person to do the hauling and that such goods were so hauled by another and an independent truck line. When the appellant attempted to make such proof of such defense appellees interposed an objection on the ground that it could not be shown under a plea of the general issue and that no other plea had been filed. Thereupon the attorney for the appellant stated to the court that he had been recently employed in the case and if the court was of the view that such defense was not proveable under the general issue he desired to have leave to file a special plea setting up such defense. The court denied leave to file such special plea and refused to permit the appellant to disclaim ownership of the truck

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in question and to further disclaim any contractual relationship between himself and appellees.

The question presented for this court to determine is whether or not the court erred in its ruling in refusing to allow the appellant leave to file a special plea as requested and in refusing him the right to make proof disclaiming any contractual relationship between himself and appellees.

It will be observed that the appellant's contention was not alone that the truck which conveyed the goods in question was not owned or operated by him. The defense was not merely that the appellant did not own and operate the instrumentality in question, that is, the truck, but that he did not undertake to convey and deliver the goods safely as was charged in the declaration. In other words the appellant contends that even though a certain truck conveyed the goods and that by the improper management and control and operation of the same certain injuries to the property of appellee's resulted the plea of the general issue did not imply or in any other manner concede or admit that appellant ever undertook the arrangement averred in the declaration or that he became liable as charged to safely convey and deliver the goods.

The contractual relationship which appellees contend was established by reason of the appellant having agreed to safely convey and deliver the goods could not have been denied in any other fashion than by the plea of the general issue. Appellees charge that on a certain date they established a certain contractual relationship with the appellant. This the appellant denies by the filing of the general issue irrespective of the ownership of the instrumentality in question.

The appellant was not permitted to prove on the trial that he had no business relations with appellees. The appellant sought to show by his own testimony that he was not employed at

in relation with the various kinds of commercial relations
ship between himself and the others.

The various relations of the kind which are mentioned

in question are not the same as those which are mentioned in
the other part of the report. It is not the same as those which
are mentioned in the other part of the report. It is not the same as those which
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all for the services mentioned in the declaration. If there was no employment it matters not whether the truck was his truck or not, and under the plea of the general issue he had the right to show if he could that he never undertook to transport the goods of the plaintiff. It was incumbent upon appellees to prove the contract of shipment in the first instance and the appellant had the right to deny the existence of such contract and to do so under a plea of the general issue. Furthermore, the plea of the general issue did not admit the contract of a shipment in manner and form as charged in the declaration. Moreover, since it is contended by appellees that the truck in question was the truck of appellant, to meet that contention the court should have permitted appellant to file a special plea.

The discretion of the trial judge in the matter of an application for leave to file an amended or additional plea or affidavit of merits should not be so exercised as to defeat justice but should be liberally exercised in favor of allowing such new pleadings as are essential to the presentation of a parties cause of action or defense. *Hunziker vs Mulchey*, 215 Ill. App. 508; *Delfosse vs Kendall*, 283 Ill. 301; *Carlson vs Johnson*, 263 Ill. 556.

For the reasons above assigned we think the judgment of the Circuit Court of Lake County should be reversed and the cause remanded which is accordingly done.

Reversed and Remanded.

All the above mentioned in the following. It must be
no exception is subject and whether the same was the same or
not, was under the law of the general law, but the right is
also it is said that no more evidence is required to prove the
of the plaintiff. It was suggested upon evidence to prove the
conduct of defendant in the first instance and the defendant had
the right to deny the allegations of each defendant and to do so

under a plea of the general issue. Furthermore, the plea of the
general issue did not admit the defendant of a judgment in money
and law as applied in the following. However, there is a
contracted by a bill of exchange that the bill is payable to the order
of plaintiff, it must first establish the bill must have been
issued according to the general law.

The allegation of the first issue is the matter of an

application for the law, it is an alleged as additional fact of
evidence of which would be to establish as to which party
but could be directly established in fact of which party now
given as to the evidence in the presentation of a party's case
of action or defense. Plaintiff vs. Defendant, 100 Ill. App. 2d 100.
Defendant vs. Plaintiff, 100 Ill. App. 2d 100; Plaintiff vs. Defendant, 100 Ill. App. 2d 100.
The law of the case is not subject to the law of the case.

of the various facts of the case would be required to be
cases presented which is a bill of exchange. It is
However, the following.

It is said that no more evidence is required to prove the

of the plaintiff. It was suggested upon evidence to prove the

conduct of defendant in the first instance and the defendant had

the right to deny the allegations of each defendant and to do so

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

Abstract
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 661

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 28 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

HENRY J. SEGGERMAN AND
CASSIE SEGGERMAN.
APPELLANTS.

V S.

APPEAL FROM THE CIRCUIT

JOHN C. WILKINSON, DELMAR
GEE, HERMAN OCHS AND
HARM HARMS,
APPELLEES.

COURT OF WOODFORD COUNTY.

JETT, J.

This is a suit instituted by Henry J. Seggerman and Cassie Seggerman, appellants, against John C. Wilkinson, Delmar Gee, Herman Ochs and Harm Harms, appellees, in the Circuit Court of Woodford County.

The declaration consists of two counts, and charges in substance in each count, that John C. Wilkinson, Herman Ochs, Delmar Gee and Harm Harms, appellees, conspired together to cheat and defraud Henry J. Seggerman and Cassie Seggerman, appellants, in and about the sale and exchange of their farm and residence property, for a flat or apartment building, in the city of Chicago.

The record discloses that appellee Wilkinson, at the time of the institution of this proceeding, resided in Cook County; Ochs and Gee in McLean County, and Harm Harms in Woodford County. The record further discloses the fact that Wilkinson was served with summons in Cook County and Ochs and Gee in McLean County. Wilkinson filed a plea in abatement, setting up in substance, that he was not a resident of Woodford county, but was a resident of Cook County; that Harms was made defendant in said cause for the sole purpose of attempting to vest the circuit court of Woodford County with jurisdiction over Wilkinson, Gee and Ochs; and for no other purpose; that there was no cause of action against Harms; who resided in Woodford county, and that there was not at that time and never had been any joint liability of the said defendants Wilkinson, Ochs, Gee and Harms.

ALFRED FROM THE DISTRICT
COURT OF WOODFORD COUNTY.

HENRY J. WILKINSON AND
CARLIS BROTHERS,
ATTORNEYS.

V. E.
JOHN C. WILKINSON, DELMAR
GEE, HERMAN GEE AND
HARM HARMES,
AT ELIAS.

LET, 7.

This is a suit instituted by Henry J. Wilkinson
and Carlis Brothers, appellants, against John C. Wilkinson,
Delmar Gee, Herman Gee and Harm Harnes, appellees, in the
Circuit Court of Woodford County.

The declaration consists of two counts, and charges
in substance in each count, that John C. Wilkinson, Delmar
Gee, Delmar Gee and Harm Harnes, appellees, conspired together
to cheat and defraud Henry J. Wilkinson and Carlis Brothers,
appellants, in and about the sale and exchange of their land and
residence property, for a flat or specified dollar, in the
city of Chicago.

The record discloses that appellee Wilkinson, at
the time of the institution of this proceeding, resided in Cook
County, Ohio and Goe in Melan County, and Harm Harnes in Wood-
ford County. The record further discloses that John Wilkin-
son was served with summons in Cook County and Goe and Goe in
Melan County. Wilkinson filed a plea in answer, setting up
in answer, that he was not a resident of Woodford County,
but was a resident of Cook County; that Harnes was also defendant
in said cause for the sole purpose of attempting to vest the
 Circuit Court of Woodford County with jurisdiction over Wilkinson,
Goe and Goe; and for no other purpose; that there was no cause
of action against Harnes; who resided in Woodford County, and
that there was not at that time and never had been any joint

Ochs and Gee joined in a plea in abatement, setting forth that they were residents of McLean County, and otherwise substantially the same as the plea of Wilkinson. Replication precludi non was filed by appellants to said plea. Harms filed a demurrer to the declaration which was overruled. He then pleaded the general issue.

Issues were joined and a jury trial had, resulting in a verdict finding the issues for the defendants. The following judgment was rendered on the verdict:

"It is therefore considered and ordered by the Court that service of the writ, and the writ issued in said cause as to defendants, Herman Ochs, Delmar Gee and John C. Wilkinson, be and the same is hereby quashed, and that said defendants have their costs and charges in this behalf and execution issue therefor."

This appeal is prosecuted to reverse said judgment.

The evidence shows that Henry J. Seggerman, appellant, owned a farm of 120 acres in Woodford County, and a residence property in the Village of Minonk, in which his wife, Cassie Seggerman had an inchoate right of dower. The evidence further shows that appellant Henry J. Seggerman traded this property for an apartment building in Chicago. It is the contention of appellants that the evidence discloses that a conspiracy existed between Wilkinson, who resided in Chicago, Ochs and Gee, who are residents of Bloomington, and Harms, a brother-in-law of Henry J. Seggerman, appellant, to defraud and swindle appellants out of their farm and residence property. It is contended on the part of appellees that no such conspiracy existed; that Harms, who resided in Woodford County, did nothing towards causing the consummation of the trade in question; that even though, if a conspiracy did exist, for such purpose, unless appellee Harms was a party thereto, the cause of action could not be maintained in Woodford County. The issue submitted to the jury, was, therefore, with reference to whether or not a conspiracy existed as charged, to which Harms was a party. In other words the issue submitted to the jury was whether or not appellee Harms was

John and Joe joined in a plea in abatement, setting forth that they were residents of Jackson County, and otherwise substantially the same as the plea of Wilkins. Defendant's counsel now was filed by appellants to said plea. Henry filed a demurrer to the abatement which was overruled. He then pleaded the general issue.

Issues were joined and a jury trial had, resulting in a verdict finding the issues for the defendant. The following judgment was rendered on the verdict:

"It is therefore adjudged and decreed by the Court that service of the writ, and the writ issued in said cases as hereinbefore, be and they are hereby set aside, and the writs of habeas corpus be and they are hereby granted, and that said defendants have their costs and charges in this behalf and therein taxed hereafter."

This appeal is presented to reverse said judgment. The evidence shows that Henry J. Bergerman, appellant, owned a farm of 180 acres in Jackson County, and a residence property in the Village of Lincoln, in which his wife, Cora, resided. The evidence further shows that appellant Henry J. Bergerman traded this property for an apartment building in Chicago. It is the contention of appellants that the evidence discloses that a conspiracy existed between Wilkins, who resided in Chicago, Cora and Joe, who are residents of Elmhurst, and Henry, a brother-in-law of Henry J. Bergerman, appellant, to defraud and swindle appellants out of their time and valuable property. It is contended by the part of appellants that no such conspiracy existed; that Henry, who resided in Jackson County, did not in fact conspire with the consummation of the trade in question; that even though, if a conspiracy did exist, for such purpose, unless explicit facts were a party thereto, the cause of action could not be maintained in Jackson County. The issue submitted to the jury, was, therefore, with reference to whether or not a conspiracy existed as charged, in which Henry was a party. In other words the issue submitted to the jury was whether or not a conspiracy existed as

was made a party defendant for the sole purpose of attempting to vest the court with jurisdiction over the other defendants, and for no other purpose, or whether Harms was guilty of conspiracy with the other defendants, as charged in the declaration, to defraud his brother-in-law and his brother-in-law's wife? If, on the issue formed, Harms was found guilty as charged in the declaration, it would have then been necessary for the other defendants to enter a general appearance, and plead to the merits of the case. If the defendant Harms was found not guilty of the charge alleged against him in the declaration, then the court was without jurisdiction over the other defendants.

The record shows that Harms had traded a farm of his own for Chicago property, through Wilinon, and was satisfied with the transaction; that appellant's brother, Dick Seggerman, and appellants brother in law, Mr Jenkins, had also previously acquired Chicago property through Wilkinson. It appears that they were all satisfied with their respective deals, and that appellant Henry J. Seggerman knew of the transactions with his respective relatives.

The record shows that Harms had talked with Appellant, Seggerman, regarding the deal he himself, had previously made, and either at the suggestion and request of Seggerman, or of his own volition, took Gee to see Seggerman, and went with them to look at the Seggerman farm. The introduction of Gee to appellant Seggerman, about May 1, 1923, by Harms, is the only connection Harms had with the entire transaction, so far as the record discloses in this case. The only other time that Harms appears in the matter was the morning he brought the mail to the Seggerman's when they were starting to Chicago to look at the Chicago property, and was invited by Seggerman to go along, but he refused to go. The only representation made to appellants by Harms was regarding his own deal, and that Wilkinson was a nice man, that he had never met a nicer man in his life.

Harms, among other things testified, that he did not

was without justification over the other defendant.

He was alleged against him in the declaration, that he had
of the case. In the instant case the Court said nothing of the
defendant to enter a general averment, and placed on the other
declaration, it would have been necessary for the other
on the issue framed, there was found nothing as charged in the
to defend his brother-in-law and his brother-in-law's wife.
agreed with the other defendants, as charged in the declaration,
and the other purpose, on which the Court was called to con-
sider, was to establish over the other defendant,

that he was a party defendant for the sole purpose of establishing

The record shows that Barker had been arrested and placed in custody of the FBI on 10/10/34.

own for 37 years; property, through William, had been retained
with the transaction; that appellant's brother, Dick Lee Brown,
and appellant's brother in law, Mr. Langford, had also previously
acquired Chicago property through William. It appears that
they were all affiliated with these real estate dealers, and that
appellant Henry J. Brown knew of the transactions with his
respective relatives.

no. on 1 day - 1st day - 1st day - 1st day

...and after of the association and request of Government, or of
his own volition, took care to see Government, and went with
them to look at the Government. The introduction of the
to official business, about the 1st of June, in the
connection between the two parties, as far as the
second class in this case. The only other time that
appears in the letter and the coming to the well to the
Government's own way were coming to the well to look at the
Government property, and was found to be a matter of the
he refused to go. The only explanation made in explanation
of what was regarding his own case, and that WILKINS was
also that he had never had a right in his life.

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know of the flat building for which Seggerman had traded; that he did not know what the rents of the building were; never talked to Wilkinson about it, or heard any representations made by him; that he was never employed by Ochs, Gee or Wilkinson in this matter; did not know that Mr. Seggerman was being defrauded and deceived or that anybody had any intention of defrauding him. There is nothing in the record contradicting the testimony of Harms.

We have read the testimony as it is found in the abstract, and being familiar with the same, we are not prepared to say that the verdict of the jury is against the manifest weight of the evidence. In so far as the record connects Harms with the alleged conspiracy, it appears to us, that all that is practically shown, is that appellee Harms introduced his brother-in-law Henry J. Seggerman, the appellant, to Gee, and through Gee or Gee and Ochs, Seggerman met Wilkinson in Chicago, through whom he made the trade, and that Harms told appellant Seggerman, that he had made a trade of his farm for Chicago property, through Wilkinson, and that he was a fine man, and that he was satisfied with his trade.

The evidence shows that appellant Seggerman, made several trips to Chicago to look at the property, the first time being in May, and the trade was not made until the following August; that different members of appellants family went with him to look at the property; that Harms did not accompany them on any of these trips. From an examination of the record it appears that the evidence wholly fails to show any concert of action between Harms, Wilkinson, Ochs or Gee, in connection with the trade of said properties. The evidence tends to show that Harms did not have any knowledge concerning the property for which Seggerman traded, and that he did not talk with any of the other defendants concerning the deal made by Seggerman. Kraft vs. Greenough, 175 Ill. App. 124, was an action on the case charging

to have been the testimony as to the fact that the
defendant, and being familiar with the same, was not
so as to say that the verdict of the jury is against the
of the evidence. In so far as the recent evidence is
the alleged conspiracy, it appears to me, that all that is
locally known, is that appellee had introduced the evidence
law Henry J. Byrd, the appellant, to the, and through the
on the and other, appellee was admitted to the, and
when he made the trade, and that appellee sold appellee
that he had made a trade of his land for Chicago property,
through Wilkins, and that he was a time, and that he was
established with his funds.

The evidence shows that appellant was present at the
several trips to Chicago to look at the property, the first time
being in May, and the trials were not held until the following
August; that different numbers of appellants testified that they went
to look at the property; that James did not accompany them on any
of these trips. From an examination of the record it appears
that the evidence would lead to the conclusion of each
of said juries, Wilkinson, Ogle et al., in connection with the
trials of said properties. The evidence tends to show that there
is not here any knowledge concerning the property for which
Germanen traded, and that he did not deal with any of the other
defendants concerning the said sale of equipment. Ex. 70 vs.

a conspiracy between a number of persons, to cheat and defraud the plaintiffs therein, in a certain land deal; and in the decision of the case the court among other things, said: "Defendant is not shown to have been a party to a conspiracy to defraud concerning the value and location of land, where he took no part in the making of the contract involved, and made no statement concerning the location and quality of the land, and was not present when anything was said or done after the fraudulent contract was signed, and the price paid, though he was informed that the plaintiff had "signed up" and took the money from his partner and sent a draft therefor to the person who held the title, and later urged the plaintiff not to repudiate the contract because of the alleged insufficiency of title or we will make you trouble".

The rule is that before a recovery can be had in cases of this character, the proof must be clear and convincing that the party charged is guilty of fraud and deceit, as charged. McKennan vs. Michelberry, 242 Ill. 117-134.

The record discloses that the appellants were given every opportunity to examine the Chicago property, and to make independent investigation regarding the same. During the pendency of the trade, appellants were in Chicago on several occasions, and they took with them Dick Seggerman, and others, to look at the property. There is nothing in the evidence to show that appellants were prevented in making an independent investigation.

The rule is that one cannot seek redress for fraud where he acted upon his own knowledge or judgment, based upon independent investigation. 26 Corpus Juris 1162; 12 R.C.L. 357.

Furthermore, the rule is that even though misrepresentations regarding values have been made, that when the party seeking redress has failed to avail himself of knowledge readily within his reach, that he cannot recover. Van Gundy vs. Steel, 261 Ill. 206-215.

It is also insisted by the appellants that the court

a conspiracy between a number of persons, to obtain and deliver
the plaintiff's therein, in a certain land deed; and in the
decision of the case the court found that the plaintiff
has not shown to have been a party to a conspiracy to deliver
conveyances to value and location of land, there is not a
in the nature of the plaintiff's, and there is no evidence
concerning the location and quality of the land, and was not
present when anything was said or done after the fraudulent
contract was signed, and the police paid, though he was informed
that the plaintiff had "signed up" and took the money from his
partner and sent a letter thereon to the person who sold the
title, and later when the plaintiff was to repudiate the contract
because of the alleged fraudulent title he will make his
trouble.

The rule is that before a recovery can be had in
cases of this character, the fraud must be clear and convincing
that the party charged is guilty of fraud and deceit, as stated.
McKenna vs. McWhorter, 248 Ill. 114-115.

The second disclosure that the appellants were given
every opportunity to examine the Chicago property, and to make in-
dependent investigation regarding the same. During the conduct of
the trade, appellants were in Chicago on several occasions, and
they took with them Dick Bergman, and others, to look at the
property. There is nothing in the evidence to show that appellants
were prevented in making an independent investigation.

The rule is that one cannot sell without to fraud
where he acted upon his own knowledge or judgment, based upon in-
dependent investigation. In Corpus Juris 1187; 11 R.C.L. 507.
Furthermore, the rule is that one cannot sell without
negligence or fraud. Appellants have been told, that when the
negligence or fraud has failed to bring about the desired result
within the time, and no second recovery. Von Gumpel vs. First,
231 Ill. 506-517.

It is also insisted by the appellees that the

erred in its ruling on the admissibility of evidence. One particular ground urged is that the court sustained an objection to the appellant Cassie Seg erman, testifying, on the ground that she was not a competent witness. The record shows that the title to the property traded for was in Henry J. Seggerman. The sustaining of the objection to the testimony of Cassie Seg erman, was in keeping with the rule announced in Kofsky -vs- Kofsky, 254 Ill. 88.

In view of the rule announced in the case last above cited, the court was correct in its ruling in this respect. Appellants contend that the court erred in striking out certain testimony, given by the witness Hubbard, to the effect that in a conversation between the witness Hubbard and Wilkinson with reference to the transaction in question, that Wilkinson "got mad cursed and swore and declined to give any information about it," and ordered Hubbard out of his office.

We have examined the abstract minutely with reference to this contention by appellants, and it shows that part of the answer was allowed to stand and part of it was stricken. In view of what is disclosed we are of the opinion that the court did not err in its ruling in this regard.

It is further insisted that the court erred in permitting appellee Harms, to answer the question as to whether or not he was satisfied with the deal he had made through Wilkinson. In view of the fact that one of the things appellants contend that appellee Harms, did, in connection with the transaction in question was that he stated to the appellant Henry J. Seggerman, that he had made a deal for property in Chicago, through Wilkinson, and was satisfied with the same. Owing to the state of the record, we are not prepared to say that reversible error was committed by the court in its ruling in this instance. On cross examination Harms was asked "Where is this man Gee?" Objection was made to the question and sustained. There was no error in this ruling, as there

to the fact that the Government has not been able to secure the necessary funds to carry out its policy. The Government has not been able to secure the necessary funds to carry out its policy. The Government has not been able to secure the necessary funds to carry out its policy.

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in view of the fact that the only person who was present at the time of the shooting was the person who was shot.

[illegible][illegible]

is nothing to show why the question was at all pertinent to any issue in the case, or that it was proper cross examination.

What is said here will apply to the ruling of the court in relation to the matter of the letter from Ochs and Gee. The record discloses that the court permitted Harms to answer that he got a letter, but sustained the objection to a question as to where that letter was. So far as the record discloses there is nothing to show what connection the letter had with the case, if any, and that it was not proper cross examination of anything the witness had testified to in chief.

Appellants contend that the court erred in modifying certain instructions offered by them, and giving them as modified. It will serve no good purpose to set out the instructions or the modifications made. The modifying and giving of the instructions complained of by the appellants, was not erroneous, and the court properly made such modifications before giving them.

Appellants urge that the court erred in refusing certain instructions offered by them. We have examined very closely this contention of appellants, and we are of the opinion, and the record so discloses, that as to those instructions which stated correct principles of law, that were refused, they were covered by other instructions given on the part of appellants.

Another contention of appellants is that the court erred in giving certain instructions on the part of appellee. Examination of the record shows that no serious error was committed by the court in this respect.

It is earnestly argued by appellants that the court erred in submitting the special interrogatories to the jury. The special interrogatories submitted to the jury ultimate questions of fact, and the verdict on the special interrogatories is in harmony with the general verdict. There was no error by reason of submitting the special interrogatories.

Appellants contend that the court unduly limited the argument of the cause to the jury. We do not think that any harm

is not to be taken as an indication of any
change in the law, or that it was ever
What is well known will apply to the same in relation
to the matter of the latter case and law. The latter case
shows that the same principle applies to cases that are not
before, but contains the principle as a matter of course
that is not. It is the same as the former case, there is nothing
to show that something has been done, it is not, it is not, it is not
that it was not proper to make a statement of the same. The same
has been said in other cases.

Appellate court has not been in relation
certain instances offered by them, but there are no instances
It will serve as good ground to see how the law is in the
relation of the law. The law is the same as the former case, there is nothing
contained in it, but the law is the same as the former case, there is nothing
properly made even in relation to the law.

Appellate court has not been in relation
certain instances offered by them, but there are no instances
closely this relation of the law, and we are all in the same
and the same as the former case, there is nothing
added to the principle of law, but there is nothing
covered by the law, but there is nothing
Another instance of the law is that the law
error is that certain instances of the law are not in relation
The law is the same as the former case, there is nothing
by the court in this respect.

It is not to be taken as an indication of any
change in the law, or that it was ever
What is well known will apply to the same in relation
to the matter of the latter case and law. The latter case
shows that the same principle applies to cases that are not
before, but contains the principle as a matter of course
that is not. It is the same as the former case, there is nothing
to show that something has been done, it is not, it is not, it is not
that it was not proper to make a statement of the same. The same
has been said in other cases.

was done appellants by limiting the argument. Much is said in relation to the conduct of the trial judge. We have examined the record very closely, and we are unable to see in any respect whatever, wherein the remarks of the court were detrimental to the cause of the appellants.

We are thoroughly convinced that there was nothing done or said by the trial judge that was improper, and was not called for in the progress of the trial.

After due consideration of all the questions raised in the case, we are of the opinion that the judgment of the circuit court of Woodford County should be affirmed, which is accordingly done.

Judgment affirmed.

was found applicable of limited use. When he said in relation to the content of the trial judge. We have examined the record very closely, and we are unable to see in any respect what error, within the meaning of the court was detrimental to the cause of the appellant.

We are thoroughly convinced that there was nothing done or said by the trial judge that was improper, and we have called for in the progress of the trial.

After the consideration of all the questions raised in the case, we are of the opinion that the judgment of the court is correct and we think it would be affirmed, which is respectfully done.

Respectfully submitted.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 661²

BE IT REMEMBERED, that afterwards, to-wit: On

AUG 23 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

GERTRUDE GAULT,

Appellee,

vs

JOHN GAULT,

Appellant.

APPEAL FROM THE CIRCUIT
COURT OF WINNEBAGO COUNTY.

Jett, J.

The record shows that on June 7th, 1927, Gertrude Gault, appellee, filed a bill in the Circuit Court of Winnebago County against John Gault, appellant, for divorce charging that appellant had given her a communicable venereal disease; that one child was born of said marriage and was twenty-one months of age. An answer was filed by the appellant to said bill denying the allegation relied upon for a divorce. Thereafter appellee obtained leave of the court to file an amended bill which was allowed and the same was filed and in addition to the original charge made by appellee the appellant was charged with being guilty of extreme and repeated cruelty setting forth particular acts of cruelty as having been committed on February 2nd, September 21st, 1926, and June 5th, 1927. To said amended bill appellant filed an answer denying the material allegations of the same. A trial was had by the court without the intervention of a jury and resulted in a finding and decree in favor of appellee. This is an appeal prosecuted by John Gault, the appellant, with a view of reversing the decree.

The record originally filed in this court contained only the pleadings, findings and decree and did not contain a transcript of the evidence. It was then insisted by the appellant that the findings in the decree were not sufficient to support the same. Thereupon appellees, by leave of the court, filed a transcript of the evidence. The decree rendered by the court was based alone on the finding that appellant had been guilty of

extreme and repeated cruelty. The only question argued by appellant for a reversal of the decree after a transcript of the evidence had been filed is as to whether or not the same is sufficient to support the decree.

The record discloses that the appellee testified to certain specific instances when the appellant had been guilty of acts of physical cruelty towards her. Appellee testified that on the 2nd day of February, 1926, appellant hit her twice on the shoulder; that the blow made a red spot and it was black for two days thereafter; that he hit her hard and swore at her and called her foul names; that on September 21st, 1926, appellant grabbed her by the throat and made a cut and red marks thereon, pushed her down on the floor and used foul language toward her; that on June 5th, 1927, at the home of appellee, appellant hit her and left a mark across her chest and on her right side. Appellee was corroborated to a certain extent by witnesses who had seen the marks on her person and heard her ask the appellant not to strike her again. The evidence tends to show that appellant was continually angry at appellee and so much so that on the 27th day of March, 1927, he quit speaking to appellee. According to the evidence of appellee, appellant was everything but a good and kind husband.

Appellant denied specifically the acts of cruelty testified to by appellee. The appellant was not corroborated although two or three witnesses testified having heard appellee use harsh expressions toward appellant.

In conclusion, we are not prepared to say that the trial court who saw the witnesses and heard their testimony committed reversible error in granting the decree in this cause; under the evidence as disclosed by the record we do not feel that we would be justified in reversing the decree and remanding the cause.

The decree of the Circuit Court of Winnebago County is therefore affirmed.

Decree affirmed.

James Earl Ray died in an execution chamber at the Missouri State Penitentiary in 1999. He was 40 years old at the time of his death. Ray was convicted of the assassination of Dr. Martin Luther King Jr. in 1969. He was sentenced to death by a Missouri court. The execution was carried out by a lethal injection. Ray's last words were "I am a poor man, I am a poor man, I am a poor man."

[illegible]

... 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621,

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice:

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

2501A 661³

BE IT REMEMBERED, that afterwards, to-wit: On
AUG 28 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

| | | |
|---------------------|---|---------------------------|
| THE PEOPLE OF THE | : | |
| STATE OF ILLINOIS, | : | |
| DEFENDANT IN ERROR. | : | |
| | : | |
| V S. | : | ERROR TO THE COUNTY COURT |
| | : | |
| RENE SILVERSMET, | : | OF ROCK ISLAND COUNTY. |
| PLAINTIFF IN ERROR. | : | |

Jett, J.

The record shows that on the 17th day of February, 1927, an Information was filed by the state's attorney in the County Court of Rock Island County, against Rene Silversmet, plaintiff in error; said information consists of two counts. The first count charges that the defendant Rene Silversmet, on the 16th day of February, 1927, did then and there unlawfully possess intoxicating liquor, with the intent of then and there using the same in violation of the Illinois Prohibition Act, without then and there having a permit from the Attorney General of the State of Illinois, to possess said intoxicating liquor.

The second charges that the defendant on the said 16th day of February, 1927, did then and there unlawfully manufacture intoxicating liquor with the intent then and there to manufacture the same, in violation of the Illinois Prohibition Act, and without then and there having a permit from the Attorney General to manufacture said intoxicating liquor.

The record discloses that on the 15th day of February, 1927, a complaint for the issuance of a search warrant to search the premises of the defendant, known as 4209 14th Ave. in the City of Rock Island, was filed in the office of a police magistrate, in the city of Moline. The complaint, after the formal part, is as follows: "Affiant states that on this, the 15th day of February, 1927, after being duly sworn, upon his oath, that he has just and reasonable grounds to believe, and does believe that intoxicating liquor is now unlawfully manufactured and possessed within prohibition territory, to-wit, at and within

a certain two story, yellow frame building, together with all out-buildings belonging thereto, located and known as No. 4209 14th Avenue, in the City of Rock Island, Illinois, which said premises are occupied as a dwelling house by one Rene Silversmet, and that the following are the reasons for his belief, to-wit:, affiant states that on the 15th day of February, 1927, he was near the above described premises, and there smelled the fumes and odor of fermenting grain mash, such as is used in the manufacture of intoxicating liquor, commonly called hooch, or home made whiskey. Affiant further states that he is familiar with the fumes and odor of fermenting grain mash, and knows that the fumes and odor he detected were such fumes and odor; and that he was sufficiently close to the above described premises to know that the fumes and odor which he detected, came from the above described premises."

And afterwards, to-wit, on the 15th day of February, 1927, the police magistrate issued a search warrant directed to the sheriff of Rock Island county, and commanded a dilligent and careful search of the premises mentioned and described in the complaint, for intoxicating liquor, and seize and bring any and all intoxicating liquor there found and all vessels containing the same and all implements, furniture and vehicles, kept or used for the purpose of violating, or with which to violate any law of this state, and any and all persons in whose possession they are found forthwith before him the said police magistrate.

The premises mentioned and described in the search warrant were, on the 16th day of February, 1927, searched, and a return was made thereon, by the sheriff, that he had executed the search warrant by reading it to the within named Rene Silversmet, and by searching the within described premises, and found and secured one 50 gallon still, complete; about 40 gallon of intoxicating liquor; three barrels grain mash and two sacks of sugar, and arrested Rene Silversmet. Subsequently such proceedings were had that a motion was made by plaintiff in error to quash the search warrant and impound the evidence, with the exception of the sugar,

a certain two story, yellow frame building, situated with all
out-building belonging thereto, located and known as Lot 4000 1880
highway, in the City of New Haven, Conn., with said premises
are occupied as a dwelling house by one Mrs. Elizabeth, and that
the following are the names of the said building, located, situated
dated last of the 1st day of February, 1917, as was then the
above described premises, and have located the same and also of
forwards this week, such as to be used in the construction of
interests in said premises, commonly called streets, or some other way.
All said premises were then as is located with the same and
also of interests therein, and known that the same was then
be located with said premises and also as was then located
also to the above described premises, and also as was then and
also as was then located, and also as was then located, and
and afterwards, located, as was then and at present,
and also as was then located as a separate premises located as
the property of said building, and also as was then and
located as was then located and also as was then located in the
complaint, for interests therein, and also as was then and all
interests in said premises and all interests therein, and also
and all interests, located, and also as was then and for the
purpose of interests, or any other as was then and for the
state, and also as was then located in said premises, and also as was then
forwards, and also as was then located.

The premises mentioned and described in the above
written act, on the 1st day of February, 1917, were then, and a
return was made thereon, by the sheriff, that he had returned the
second written by reading it to the widow named Mrs. Elizabeth,
and by reading the said written premises, and also as was then
second one 22 (also 22), located, and also as was then and
also as was then located, and also as was then and also as was then
that a return was made by reading it to the widow named Mrs. Elizabeth,
and also as was then located, and also as was then and also as was then

which the defendant wanted returned to him. The motion to quash the search warrant and impound the evidence, was, by the court, denied, and the plaintiff in error excepted. To the information the plaintiff in error entered a plea of not guilty. A jury trial was had and the defendant was found guilty under each of the counts of the information. The judgment of the court was that the defendant be fined the sum of \$500.00, together with the costs of prosecution, and that execution issue therefor, under the first count of the information; that the said defendant be sentenced to the county jail of Rock Island county for a period of six months, and that he pay the costs of the prosecution, and that execution issue therefor, under the second count of the information.

It is further ordered by the court that if said fine and costs under the first count of the information, are not paid upon the expiration of the sentence, under the second count, of the information, the defendant shall work out said fine and costs under the first count, on the public roads in Rock Island County, Illinois, under the direction of the County Superintendent of Highways of Rock Island County, Illinois, at the rate of \$1.50 per day for each day's work, until said fine and costs are fully paid, in this manner, or until the said defendant is otherwise discharged, as provided by law.

It is further ordered by the court that the said defendant shall not start to work out said fine and costs, under the first count of the information until all imprisonment shall have been concluded under the second count of the information, and that the county superintendent of highways of Rock Island County, Illinois, shall confine the said defendant in the county jail of Rock Island County during each night, and at any other time such prisoner cannot be kept at work. The plaintiff in error excepted and sued out this writ of error. A number of reasons are assigned, by the plaintiff in error for reversal of the judgment.

It is argued by the plaintiff in error that the

which the following model appeared to him. The model is made of wood and is of the same size as the original. It is a very simple model and does not show the details of the structure. It is a very good model for the purpose of showing the general shape and size of the structure.

...and that he was the father of the ... and that he was the father of the ... and that he was the father of the ...

It is further stated by the agent that it will
also be made known to the public, and all
will upon the completion of the contract, when the contract is
of the information, the Government will not have any more
control over the contract, as the contract is not
Government, which is the property of the Government, and
of which it has full control, and it is not
for the Government, and it is not for the
and, in this case, or until the contract is completed
discovered, as provided by law.

the Government.

reference has been made, by the Committee in its report, to the fact that the Government of the United States has been unable to obtain the necessary information from the Government of the United Kingdom, in order to enable it to make a proper estimate of the value of the property of the United States in the United Kingdom. The Committee has endeavored to obtain this information, but has been unable to do so. It has, however, obtained some information from the Government of the United Kingdom, which it has set out in its report. It has also obtained some information from the Government of the United States, which it has set out in its report. It has, therefore, been able to make a rough estimate of the value of the property of the United States in the United Kingdom. It has, however, been unable to make a more accurate estimate, and it has, therefore, set out in its report the reasons for this. It has, however, been able to make a rough estimate of the value of the property of the United States in the United Kingdom. It has, however, been unable to make a more accurate estimate, and it has, therefore, set out in its report the reasons for this.

not a few groups of little ones, and of course, it is

complaint for the search warrant was null and void, and that the court erred in over ruling the motion to quash the same, and to impound the evidence, and that the court erred also, in admitting the testimony of the officials in relation to any information they received under and by virtue of the search warrant, and in entering the judgment.

Plaintiff in error insists that the possession of fermenting grain mash, is not the violating of any law, and that the possession of the same did not show probable cause for the issuance of a search warrant, to search the premises of the plaintiff in error. Section 28, of the Illinois Prohibition Act, Cahill's Statute, Chap. 43, para. 29 provides: "It shall be unlawful to have or possess any liquor intended for use in violating this Act, or property designed for the illegal manufacture of liquor, and no property right shall exist in any such liquor or property."

The search warrant commanded the officer to make dilligent and careful search of intoxicating liquor, and seize and bring, any and all intoxicating liquor, and all vessels containing the same, and all implements, furniture and vehicles kept for use, for the purpose, or with which to violate any law of this state, before the police magistrate. It is insisted that if mash itself is not the subject of search and seizure, under the prohibition laws of this state, then fumes and odors emanating fr m the mash did not constitute probable cause for the issuance of a search warrant, to search the premises of the plaintiff in error. This contention is not sound because of the fact that it is a violation of the law, as we have already seen, as provided in Section 28 of the Prohibition Act, to have or possess any liquor, intended for use in violation of the act or property designed for the illegal manufacture of liquor.

It is next insisted that it is necessary, in the complaint for the issuance of a search warrant, to charge that a crime has been committed. In People vs. Holton, 326 Ill. 481,

[illegible][illegible]

1. The first question is whether the evidence is sufficient to establish that the defendant is guilty of the crime charged. The evidence is sufficient to establish that the defendant is guilty of the crime charged.

it is said "The complaint and affidavit for a search warrant are sufficient where the form issued is that prescribed by the Statute, and where every material element of the offense charged, as defined by the statute, is stated in the complaint; and it is not necessary that the complaint and affidavit charge the commission of a crime."

The argument of plaintiff in error is very voluminous, bearing upon the question of the alleged insufficiency of the complaint in that it does not charge probable cause. There is no satisfactory definition of what constitutes probable cause for the issuing of a search warrant, and the question whether probable cause exists is a judicial question, to be determined by the magistrate before whom complaint is made. Probable cause exists when the magistrate is convinced that there is reasonable ground for suspecting that the property to be searched or seized is possessed for prohibited purposes. People vs. Daugherty, 324 Ill. 160.

It has been said that probable cause for a search exists, if the facts and circumstances before the officer are such as would warrant a man of prudence and caution in believing that an offense has been committed. Carroll vs. U.S. 69 U.S. (Law Ed) 543-555; Steele vs. U.S. 69 U.S. (Law Ed) 757-761.

The affiant swore that on the day before the search was made, he was near the premises in question and smelled the fumes and odor of fermenting grain mash, such as is used in the manufacture of intoxicating liquor, commonly called hooch or home made whiskey; that he is familiar with the odors and fumes of fermenting grain mash and knew that the fumes and odor which he detected were such fumes and odor; that he was sufficiently close to said premises to know that the fumes and odor he detected came from said premises, and said premises consisted of a certain two-story yellow, frame building, located at 4209 14th Avenue, in Rock Island, and that said premises were occupied as a dwelling house by the plaintiff in error.

It is said "The complaint was submitted to the Board of Health and the Board of Health have not yet decided upon the complaint." The complaint was submitted to the Board of Health and the Board of Health have not yet decided upon the complaint. The complaint was submitted to the Board of Health and the Board of Health have not yet decided upon the complaint.

The complaint was submitted to the Board of Health and the Board of Health have not yet decided upon the complaint. The complaint was submitted to the Board of Health and the Board of Health have not yet decided upon the complaint. The complaint was submitted to the Board of Health and the Board of Health have not yet decided upon the complaint.

It is said that the complaint was submitted to the Board of Health and the Board of Health have not yet decided upon the complaint. The complaint was submitted to the Board of Health and the Board of Health have not yet decided upon the complaint. The complaint was submitted to the Board of Health and the Board of Health have not yet decided upon the complaint.

The complaint was submitted to the Board of Health and the Board of Health have not yet decided upon the complaint. The complaint was submitted to the Board of Health and the Board of Health have not yet decided upon the complaint. The complaint was submitted to the Board of Health and the Board of Health have not yet decided upon the complaint.

In view of what was stated in the complaint, we are of the opinion, under the rule as we understand it, that the showing was sufficient to convince the officer that probable cause existed for issuing the search warrant. Plaintiff in error has not cited any case which holds that the smell of fumes of fermenting mash, does not constitute probable cause. He argues that Rock Island County is an agricultural county and probably the majority of the farmers in the county feed their stock with soaked grain, which has the odor of fermenting grain mash. There is nothing in the record upon which to base this argument.

The plaintiff in error has construed the language in the search warrant, "at and within a 2 story yellow, frame building, to include only the first and second floors of the plaintiff in error's 2 story residence. In other words, it is the contention of the plaintiff in error, that the basement in which the still and liquor, and the other implements and ingredients were found, do not constitute a part of the plaintiff in error's 2 story residence. The word "building" necessarily embraces the foundation on which it rests, and the cellar, if there be one under the edifice, is also included in the term house or building. To speak of a building as being 5 stories, simply communicates the idea of its height above the ground, and neither asserts nor denies that there is a cellar under it. If there be a cellar, the word building, includes it, unaffected by the idea of its height or its foundation. *Benedict vs. Ocean Insurance Co.* 31 N.Y. (4 Tiffany) 389-394-395.

The search warrant is sufficient if it described the place to be searched with reasonable certainty. *People vs. Holton*, 326 Ill. 481-486.

We are of the opinion that the warrant sufficiently describes the place where the evidence used against the plaintiff in error was seized.

We are also of the opinion that the search warrant was not null and void, as is contended by the plaintiff in error,

[illegible]

and that the court did not err in refusing to quash the search warrant and impound the testimony.

It is also contended that the judgment of the court is not in accordance with the provisions of the statute. We have already set out the judgment of the court, and there can be no fault found with the judgment, except that part which reads as follows:-"and that the county superintendent of highways of Rock Island County, Illinois, shall confine the said defendant in the County jail of Rock Island County, Illinois, during each night and at any other time such prisoner cannot be kept at work."

In *People vs. Cary*, 245 Ill. App. 100, the question is discussed in relation to the judgment of the court in a proceeding, in which one convicted of crime may be sentenced to labor. That if a sentence to labor is imposed, the court will place the convict in the keeping of some person, and the person in whose keeping he is placed, may provide for his safe keeping, and to that end may use balls and chains, and if deemed necessary to prevent his escape, may confine him in the county jail during the night, and at any other time such prisoner cannot be kept at work. This does not necessarily mean that the prisoner, when he is sentenced to labor, as a substitute for imprisonment in the county jail, shall be confined in the county jail during the time that the fine and costs are being worked out. The party in whose custody the accused has been placed may place him in the county jail, but that shall be only in the event that there is some danger of the convicted party making his escape. If the party in whose custody the accused is placed, is satisfied the accused will not make his escape, it is not necessary that he should be held in the county jail during the time of his working out the fine and costs.

We think that the evidence was sufficient to sustain the finding of the jury. The court did not err in overruling the motion for a new trial, and denying the motion in arrest of judgment.

and that the jury did not find in favor of the defendant.

Verdict and judgment in defendant's favor.

It is also contended that the jury was

in not in accordance with the provisions of the statute.

have already and the judgment of the court, but there can

be no doubt that the jury was not in accordance with the statute.

as follows: "And that the court, in its judgment of the facts of

the County Jail of Cook County, Illinois, shall decide the case

and of any other case which may be brought before it.

In People vs. Gray, 225 Ill. 102, the question is discussed

in relation to the judgment of the court in a case, in

which one convicted of crime was sentenced to labor. That it

is necessary to have a judgment, the court will place the

in the hands of some person, and the person in whose hands

he is placed, will provide for his safe keeping, and in that

may have failed to provide, and if found necessary to prevent his

escape, may confine him in the County Jail, Illinois, and

at any other time and place, and in any manner.

has not necessarily been that the person, who is to be

to labor, as a substitute for imprisonment in the County Jail,

shall be confined in the County Jail during the time that the law

and shall be held without bail. The court in whose hands the

received has been placed may place him in the County Jail, and

that shall be only in the County Jail, and in any manner of the

convicted party making his escape. If the party in whose hands

the accused is placed, is satisfied the accused will not

his escape, it is not necessary that he should be held in the

County Jail during the time of his escape, and in any manner.

It is also contended that the court was authorized to decide

the question of the law, and that the court was not in error

the matter for a new trial, and that the matter is raised at

the trial.

The judgment of the county court of Rock Island County will therefore be reversed and the cause remanded, with directions, to the court to modify that part of the judgment so providing that the county superintendent of highways of Rock Island County, Illinois, shall confine the said defendant in the county jail of Rock Island County, during each night, and at any other time such prisoner cannot be at work, to comply with the rule as announced in People vs. Gary, 245 Ill. App. 100.

Reversed and remanded with
directions.

The interest of the people of the island

should be taken into consideration, and the
Government should be prepared to meet the
demands of the people in the event of a
revolution. The Government should be prepared
to meet the demands of the people in the
event of a revolution. The Government should
be prepared to meet the demands of the
people in the event of a revolution.

Government and people

Division

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

Callaghan

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 661⁴

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 4 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

GENERAL NO. 7886

SARAH A. PAUL)
 :
 V.)
 :
WILLIAM G. BOEKE)
 :
) APPEAL FROM THE
) CIRCUIT COURT OF
) STEPHENSON COUNTY.

Per Curiam:

By agreement of parties, this cause was to be heard with the case of Elmira M. Marshall v. William G. Boeke, and whatever decision this court might reach should apply to and be entered in both cases.

We have filed an opinion in Marshall v. Boeke, affirming the judgment in that case. It is therefore ordered and adjudged that the judgment of the circuit court of Stephenson County in favor of Sarah A. Paul and against William G. Boeke for the sum of \$2902.91 and costs be and the same is hereby affirmed.

Judgment affirmed.

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ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 07-19-2008 BY 60322 UCBAW

Per Curiam:

[illegible]

• Lemmings, 1906

STATE OF ILLINOIS,
SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and twenty-_____

Clerk of the Appellate Court

Call x B

Notar
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 661⁵

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 7 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

MAY TERM 1928

ALMA A VOLKERS, ;
Plaintiff-in-error, ;
VS ; ERROR TO THE CIRCUIT
JOSEPH P. GORDON, ; COURT OF WINNEBAGO COUNTY.
Defendant-in-Error, ;

Jett, J.

This is a trespass proceeding brought by Alma A. Volkens, plaintiff in error, in the Circuit Court of Winnebago County against Joseph P. Gordon, defendant in error.

For the purposes of this opinion plaintiff in error will be called plaintiff and defendant in error defendant.

The declaration consists of one count. It charges that on the 21st day of June 1924, the defendant with force and arms, did then and there wickedly, wilfully and wantonly make an assault on the plaintiff, and wrongfully, wilfully and maliciously beat, bruised, wounded, ill-treated and otherwise harmed the plaintiff, and committed other wrongs so that she was permanently injured and suffered great pain and was prohibited from attending to her affairs, and spent large sums of money endeavoring to be cured.

To the declaration the defendant pleaded the general issue. A jury trial was had with a finding in favor of the defendant, and judgment was rendered thereon.

Two reasons are assigned for a reversal of the judgment. The first is, that the verdict is contrary to the weight of the evidence. The second is, that the court invaded the province of the jury in giving instruction number ten given on the part of the defendant.

MY OWN LIFE

| | |
|---------------------|---|
| ALMA A. VOLKERS, | : |
| PLAINTIFF-IN-ERROR, | : |
| VS | : |
| JOSEPH E. BROWN, | : |
| DEFENDANT-IN-ERROR, | : |

Left, 4.

This is a summary of the evidence presented by Alma A. Volkors, Plaintiff in error, in the Circuit Court of the County against Joseph E. Brown, Defendant in error.

For the purpose of this evidence Plaintiff in error will be called as a witness and a finding is made that the Defendant committed the act charged.

The Defendant committed the act charged. It appears that on the first day of June last, the Defendant with force and arms, did then and there unlawfully, wilfully and maliciously assault on the Plaintiff, and wrongfully, unlawfully and maliciously beat, bruised, wounded, ill-treated and otherwise harmed the

Plaintiff, and committed other crimes to which she was lawfully injured and suffered great pain and was deprived of her personal property and goods and things of value and was

damaged.

To the fact that the Defendant committed the act charged, a jury trial was had and a finding is made of the facts and judgment was rendered thereon.

Two reasons are assigned for a reversal of the judgment.

The first is, that the verdict is contrary to law and equity of the evidence. The second is, that the court refused the request

of the jury in giving instruction number ten given on the last of

the defendant.

As to the alleged assault complained of by the plaintiff there were no witnesses except the plaintiff and the defendant. Owing to the character of the evidence we do not care to set it out in detail. The plaintiff testified that she was 55 years of age; that on the afternoon of June 21st, 1924, she went to the office of the defendant who was an osteopath in the City of Rockford, and that it was on this occasion that she was assaulted and greatly ill-treated. The evidence further shows that, notwithstanding the remarkable story told by her as to what took place on the 21st day of June 1924, she returned a week later for further treatment.

The defendant denied all the material things testified to by plaintiff. In addition to his denial, he offered certain evidence proving his reputation for chastity and morality in the vicinity in which he resided. If the jury believed the testimony on the part of the defendant it was justified in finding as it did. We are, therefore, not prepared to say that the verdict of the jury is contrary to the weight of the evidence.

It is the duty of the court on appeal to affirm a judgment as far as the evidence is concerned, unless it can be said that the verdict is manifestly against the weight of the evidence. *Snedden vs Ill. Central R. R. Co.*, 234 Ill. App. 234.

The findings of the jury will not be disturbed on appeal where there is evidence to sustain such findings. *Paden vs Rockford Palace Furniture Company*, 220 Ill. App. 534.

A verdict fairly sustained by the evidence will not be disturbed on appeal. *Lilly vs Banks*, 130 Ill. App. 15.

Instruction No. 10 complained of reads as follows:

"The court instructs the jury, that in the consideration of this case, you must consider it as between two individuals of equal standing in the community, and the fact that the plaintiff is a woman, while the defendant is a man, is no reason why her testimony should be given any greater weight than his."

As to the alleged conviction of Dr. Lee, definitely there were no witnesses present and Plaintiff and the Defendant. Coming to the conviction of the witness as to the care to set it out in detail. The Plaintiff testified that she was 25 years of age; that on the afternoon of June 21st, 1934, she went to the office of the Defendant who was an attorney in the City of Detroit, and that it was on this occasion that she was assaulted and sexually ill-treated. The evidence introduced there that, notwithstanding the remarks about this fact as to what took place on the 21st day of June 1934, she returned a year later for further treatment.

There is contrary evidence of the evidence. We are, therefore, not prepared to say that the portion of the on the part of the defendant is not entitled to admission in the vicinity in which he resided. It is not necessary to establish evidence proving the defendant has actually been within the to by plaintiff. In addition to the fact, the evidence available

It is the duty of the court on appeal to affirm a verdict if the evidence is sufficient to support it and if the verdict is not against the weight of the evidence. In the case of a verdict against the weight of the evidence, the court may set aside the verdict and order a new trial. In the case of a verdict against the law, the court may set aside the verdict and order a new trial. In the case of a verdict against the law, the court may set aside the verdict and order a new trial.

Investigation No. 10 conducted at 10:00 a.m. on 10/10/50.

The plaintiff insists that it was error for the court to give this instruction, claiming that it invaded the province of the jury. The statement in the instruction that the jury in the consideration of the case must consider it as between two individuals of equal standing in the community does not relate to the credibility of either of the parties to the suit or to the weight to be given to their respective testimony; but is a cautionary instruction, the giving or the refusing of which is largely in the discretion of the trial court.

In an action by a woman for injuries received because of the alleged sudden starting of a street car, an instruction that it is the duty of the jury to consider the defendant corporation as though it were a living person, and to consider all the evidence with the same fairness as if the contest were between two women, does not relate to the credibility of witnesses, or to the weight of the evidence, but is a cautionary instruction which is largely in the court's discretion. *Leckleider vs Chicago City Ry. Co.* 172 Ill. App. 557.

The instruction complained of does not say that the litigants are of equal standing in the community but rather that the case must be considered as between two persons of equal standing in the community. Neither does it say that they are to be judged as persons of equal standing in the community, or that their testimony was entitled to equal weight before the jury, but rather that the case must be considered without any prejudice against either of the parties, and that the fact that plaintiff was a woman, did not entitle her to any more credit than if she had been a man.

The question of fact was fairly submitted to the jury, and they made a finding, and we do not believe that the

The plaintiff insists that it was never for the jury to give this instruction, claiming that it should be given to the jury. The statement in the instruction that the jury is to consider of the case must stand as an instruction to the jury of equal standing in the community and it is not the duty of either of the parties to the suit to give weight to be given to their respective testimony; but as a consequence, instruction, the giving of the instruction of which is illegal in the instruction of the trial court.

In an action by a woman for libelous remarks of the plaintiff against a third party, an instruction that it is the duty of the jury to consider the libelous remarks as they are made a third party, and to consider all the evidence with the same balance as it would weigh between two women, does not relate to the credibility of witnesses, or to the weight of the evidence, but is a conclusory instruction which is largely in the nature of instruction. Jackson v. Chicago City Ry. Co. 128 Ill. App. 387.

The instruction complained of does not say that the plaintiff is of equal standing in the community and it is not the duty of either of the parties to the suit to give weight to be given to their respective testimony; but as a consequence, instruction, the giving of the instruction of which is illegal in the instruction of the trial court.

The question of fact was fairly presented to the jury, and they were entitled to find as they did.

plaintiff was prejudiced in any manner by the giving of the instruction No. 10. of which complaint is made.

The judgment of the Circuit Court of Winnebago County is therefore affirmed.

Judgment affirmed.

...and ...
...No. 10 of which ...
...The ...
...County is ...
...attorney.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

C & G

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 662¹

BE IT REMEMBERED, that afterwards, to-wit: On
SEP 7 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

GILES BRADLEY, :
Appellee, :
VS :
PEORIA BUS and BAGGAGE :
LINE, a corporation, :
Appellant. :

APPEAL FROM THE CIRCUIT
COURT OF PEORIA COUNTY.

Jett, J.

This is a suit brought by Giles Bradley, appellee, in the Circuit court of Peoria County, against Peoria Bus and Baggage Line, a corporation, appellant, to recover damages for injuries alleged to have been sustained by appellee and occasioned by his being struck by a motor truck belonging to appellant at a point near the intersection of Liberty and Washington streets in the city of Peoria.

The declaration consists of four counts. The first alleges that appellant on the twenty-seventh day of August 1926, being in possession of and operating a certain motor truck in a northeasterly direction along South Washington street in the City of Peoria, across the northeasterly pedestrian cross walk of the intersection of South Washington Street with Liberty Street, negligently ran into and struck appellee upon said northeasterly cross walk of said intersection, who was then and there in the exercise of all due care and caution for his own personal safety, greatly hurting the plaintiff, by reason whereof, his left clavicle was broken his back, arms, leg and chest were cut; and by means thereof appellee became sick, and so remained for a long time during which he suffered great pain, and was hindered from doing his usual work, and thereby deprived of his salary to the damage of the said appellee to the amount of \$10,000.00. The second alleges the same facts substantially as the first count, and contains the allegation that the

defendant then and there operated its motor truck at a greater rate of speed than was reasonable, to-wit: at a speed of twenty-five miles an hour. The third charges the same facts as in the first with the allegation that the intersection of Liberty street and South Washington street was then and there in and part of a closely built up business portion of the City of Peoria. The fourth is a wanton and wilful count.

To the declaration the defendant pleaded the general issue. A jury trial was had with a finding in favor of appellee and assessing his damages at \$4625.00, on which judgment was rendered.

No complaint is made as to the ruling of the court upon the evidence. A number of reasons are, however, assigned for a reversal of the judgment. The first is, that the verdict is against the manifest weight of the evidence and that the court erred in refusing to direct a verdict and in denying a new trial. Second, that the verdict is the result of prejudice and passion. Third, that the court erred in giving the fourth instruction given on the part of appellee.

Without going into a discussion of the evidence it is only necessary to say that the evidence is of such a character that it was important that the instructions given to the jury should have been accurate.

The fourth instruction given on the part of appellee reads as follows:

"The court instructs the jury that if a person without fault on his part, is confronted with sudden unexpected danger, or a sudden unexpected situation, which appears to be dangerous to a person of reasonable prudence, the obligation resting upon him to exercise ordinary care for his own safety, only

defendant then and there operated the motor truck at a speed of
of speed which was reasonable, to-wit: at a speed of twenty-five
miles an hour. The third count of the indictment is the first
with the allegation that the defendant operated the motor truck
South Washington Street was then and there in and out of a closely
built up business portion of the City of Seattle. The fourth is

a warrant and without count.

To the declaration the defendant pleaded the general

issue. A jury trial was had with a finding in favor of the
and assessed his damages at \$100.00, on which judgment was rendered.

The complaint is made on the basis of the evidence
upon the evidence. A number of reasons are, however, assigned for a
reversal of the judgment. The first is, that the verdict is against
the manifest weight of the evidence and that the court erred in
returning as direct a verdict and in granting a new trial. Second,
that the verdict is the result of prejudice and passion. Third,
that the court erred in giving the fourth instruction given in the
part of the evidence.

Without going into a discussion of the evidence it
is only necessary to say that the evidence is of such a character
that it is important that the instructions given to the jury should
have been accurate.

The fourth instruction given on the part of the
reads as follows:

"The court instructs you that if a person
without fault on his part, is confronted with sudden
unexpected danger, or a sudden unexpected alarm,
which appears to be imminent to a person of reason-
able prudence, the obligation resting upon him to
exercise ordinary care for his own safety, shall

requires him to act with such deliberation and foresight as he is able to under those circumstances."

It is the contention of appellant that the instruction should have stated to the jury that a person who is without fault, and is confronted with sudden unexpected danger, is required to exercise that degree of care which an ordinarily careful and prudent person would exercise under like or similar circumstances.

It will be observed that according to the rule announced in the instruction, the obligation resting upon appellee to exercise ordinary care for his own safety when confronted with sudden unexpected danger, only required him to act with such deliberation and foresight as he was able to under the circumstances. In Vol. 20 R. C. L. page 26, the following rule is announced.

"Negligence must be determined upon the facts as they appeared at the time, and not by a judgment from actual consequences, which then were not to be apprehended by a prudent and competent man. But it is not true that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent. The standard of conduct, whether left to the jury, or laid down by the Court, is an external standard and takes no account of the personal equation of the man concerned. The motion that it 'should be coextensive with the judgment of each individual' was exploded long ago in an English case, and since that decision there seems to have been little or no doubt on the point. It is now generally agreed that the standard of care is that exercised by the average prudent individual under similar circumstances."

In *Stack, Admn. vs The East St. Louis & Suburban Ry. Co.*, 245 Ill. 308, the court said: "There is no rule of law which prescribes any particular act to be done or omitted by a person who finds himself in a place of danger, which will constitute ordinary care, and the only requirement of the law is that his conduct shall be consistent with what a man of ordinary prudence would do under like circumstances."

We think the contention of the appellant is well taken, and that the giving of the instruction is sufficient to work a reversal of the judgment. In view of the fact that the case may

1971. The following year, the 1972, is also very

... ..

James Montgomery and John Jay to Madison and all 21

There is a small amount of water in the tank, and it is not clear if it is from the rain or from the ground.

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The process of urbanization is the movement of people from rural areas to urban areas. This is done for a variety of reasons, including the search for better living conditions, the desire for education, and the need for employment. The process of urbanization has led to the growth of large cities and the decline of small towns. This has had a significant impact on the way we live and work. For example, it has led to the development of new technologies and industries, and it has changed the way we think about the world. The process of urbanization is still going on, and it is likely to continue for many years to come. This is because there are still many people who are looking for better living conditions, and there are still many people who are looking for education and employment. The process of urbanization is a complex one, and it is one that has shaped the world in many ways. It is a process that we cannot ignore, and it is one that we must understand if we are to understand the world in which we live.

On 11/11/1944, the following were received from the following:

...and it is not possible to find any other...

It will be observed that the above is a very general statement of the facts and figures, and that the details of the same are given in the accompanying report.

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IN THEORY, THE MORE WE KNOW, THE BETTER WE CAN BE.

FILE NO. 100-441687-100

which prescribed any religious act to be done or omitted by

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reversal of the trend. In view of the fact that the trend

be tried again, we do not express any opinion as to the weight of the evidence.

The judgment of the Circuit Court of Peoria County will be reversed and the cause remanded.

Reversed and remanded.

to which it is a matter of course that we have referred to

the evidence.

The judgment of the Circuit Court of the District of Columbia

will be reversed and the case remanded.

Reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court



Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 662²

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 14 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

VERONICA PAPUTSIS, Appellee,)

v.)

JOSEPH KOCHALKA, Appellant,)

APPEAL FROM THE
CIRCUIT COURT OF
WILL COUNTY.

JONES P.J.

Appellee recovered a judgment for \$2200 and costs against appellant on account of personal injuries. The accident in which appellee received her injuries, occurred at or near the southwest corner of the intersection of Jefferson and Bluff Streets in the City of Joliet, about ten o'clock in the morning of February 1, 1927. Jefferson Street runs approximately east and west and Bluff Street runs north and south. Appellant was driving a truck west on Jefferson Street and turned south into Bluff Street.

Appellee testified that she was walking east on the south side of Jefferson Street and upon reaching the intersection stopped and then stepped out into the street; that she looked on both sides of the street and saw appellant's car at a bridge on Jefferson Street east of Bluff Street; that when she was about three or four feet out into the street, the truck turned south and struck her; that it was running fast and she heard no horn and did not see the driver put out his hand or give any signal.

Appellant testified that the day was cloudy and the pavement a little wet and slippery; that the bottom was ice; that as he proceeded west on Jefferson Street he "figured" he was not driving more than eight miles an hour; that when he reached Bluff Street, he turned "awfully slow" and changed his gear into second speed; that as he made the turn, he saw nobody in the street; that when he first saw appellee, she was three or four feet in front of him and about three feet from the sidewalk; that she continued walking until she got past his

THE UNITED STATES
OF AMERICA
v.
JAMES EARL RAY,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

EXHIBIT 1.

Appellee requested a judgment for \$100,000 and costs against appellant on account of personal injuries. The court found in which appellee requested and judgment, awarded as on near the southeast corner of the intersection of Jefferson and Fifth Streets in the City of Dallas, Texas on or about in the morning of February 1, 1967. Appellee stated that approximately 1900 and 2000 Fifth Street were open and south. Appellee was driving a white 1966 Oldsmobile Delta 88 and turned south into Fifth Street.

Appellee testified that she was walking east on the south side of Jefferson Street and was crossing the intersection when stopped and then stopped and into the street; that she looked on both sides of the street and saw appellant; that at a signal on Jefferson Street east of Fifth Street; that when she was about three or four feet east of the street, the truck turned south and stopped; that it was moving fast and she could not hear and did not see the driver; that she heard no five o'clock.

Appellant testified that the car was clearly and he perceived a little wet and slippery; that the person was not that as he proceeded west on Jefferson Street he "noticed" as was not driving were then right when he heard that when he reached Fifth Street, he turned "cautiously" and continued to gear into second gear; that as he made the turn, he was stopped in the street; that when he first saw appellant, he was about on the east in front of him and about three feet from him; that the appellant was walking south on the east side of Fifth Street.

machine, when she stop ed and turned back and "grabbed on the radiator"; that at the time he struck her, the truck was running six or eight miles an hour; and that it ran only six or seven feet afterwards. He claims that his view of appellee was obstructed by a telephone pole, with attached police and fire alarm boxes, standing at the southwest corner of the intersection.

Appellee denied that she turned back and she is corroborated by one witness. This witness placed the speed of appellant's truck at seventeen miles an hour. After the accident, appellee was fastened under the truck with the front axle resting on the upper part of her body. The front end of the truck was from fifteen to twenty feet south of the south line of Jefferson Street with its right side about three or four feet east of the west curb on Bluff Street.

Whether or not appellee was in the exercise of due care for her own safety at and immediately before the accident, and whether or not the negligence of appellant was the proximate cause of the injury were questions of fact for the jury. From an examination of the record we cannot say that the finding of the jury is against the manifest weight of the evidence. Courts of review will not reverse a finding of a trial court on questions of disputed fact, unless the finding is clearly contrary to the ^eweight of the evidence. (Noyes v. Hefferman 153 Ill. 339; Fahnestock v. City of Peoria 171 id. 454; Henderson v. Tobey 116 Ill. App. 538.)

Appellant's objection that the third instruction singles out and approves the testimony of witnesses for appellee is not well taken.

Appellee's fourth instruction relates to the question of damages. It is urged that this instruction does not confine the damages to those which were the proximate result of appellant's negligence. The instruction limits

...when she was at the ...
...at the time of the ...
...and that it was ...
...He also ...
...was ...
...the ...
...information.

...
...corroborated by ...
...of ...
...accident, ...
...front ...
...and of the ...
...the ...
...three ...
...the ...
...care ...
...dent, ...
...proximate ...
...fact. ...
...the ...
...evidence. ...
...trial ...
...is ...
...Keller ...
...434; ...

...
...evidence ...
...question ...
...not ...
...result ...

the amount of any recovery to such injuries as are alleged in the declaration and proved by the evidence. It is not as carefully guarded as it should be, but there was no serious error in giving it.

It is contended that the verdict is excessive. Dr. Benson, the physician who was called to treat appellee at the time of her injury, testified that he found an abrasion and a cut on her right cheek under the right eye; also an abrasion and a cut on her right leg below the knee, together with some minor cuts and scratches on her hands. He cleansed the wounds, applied an antiseptic lotion and bandaged them, but he took no stitches. He testified that he examined her back, arms and legs and found there were no broken bones; that it appeared she had an injury to her back, but there were no objective symptoms; that the symptoms were subjective only; that she continually complained of pain in her back down at the lower portion of her spine, but there was no mark on her back; that she was in a state of shock, very nervous and excited and more or less hysterical; that her face was bleeding and her pulse rather poor; that he administered a stimulant and the shock disappeared next day; that he visited her only five times; that the accident occurred on February 1st; that he saw her on that day, and on the 2nd, 3rd, 5th and 8th of the same month; and that his total bill for treating her was \$17.00

Appellee testified that previous to the collision she had suffered from a bleeding of the womb; that she had an operation to correct the trouble; that she had been out of the hospital a month and had experienced no bleeding or womb trouble up to the time of the accident; that the trouble recurred soon after she was struck by the truck and continued daily since that time. Dr. Benson gave appellee no treatment on that account, and so far as the record shows, she did not

The amount of my recovery is being retained in the office in the satisfaction and proved by the evidence. It is not as much as I had expected as it would be, but there was no reason for it.

It is considered that the victim is satisfied.

Baron, the physician who was called to treat the victim of the

time of her injury, testified that he found no abnormality

a cut on her right elbow under the right arm; also an abrasion

and a cut on her right leg below the knee. He also said that

other cuts and abrasions on her body. He also said that

applied an antiseptic lotion and bandaged them, but he did

no stitches. He testified that he examined her head, arms

and legs and found no other cuts or abrasions; that he ex-

amined her and he found no other cuts, but there were no ex-

cessive symptoms; that the symptoms were excessive only; that

she continually complained of pain in her left arm at the

lower portion of her arm, but there was no cut on her head;

that she was in a state of shock, very nervous and excited

and more or less hysterical; that she was free from bleeding and

her pulse rather poor; that he administered a stimulant and

the shock disappeared next day; that he visited her only five

times; that the condition occurred on February 1st; that he

saw her on that day, and on the 2nd, 3rd, 4th and 5th of the

same month; and that she never will be traveling and was 127.00

applies testified that there was no collision

she had returned from a collision of the train; that she had

an operation to correct the fracture; that she had been out at the

hospital a month and had experienced no difficulty at work

possible up to the time of the collision; that the fracture

remained open after the operation by the train and a splint

fully since that time. Dr. Johnson gave evidence as requested

in last session, and no far in the present session, and the

mention that trouble to him while he was treating her. He examined her shortly before the trial for the purpose of testifying in her behalf, and she made no mention of it to him at that time. The trial took place about nine months after the collision.

According to her testimony she had suffered from a recurrence of her womb trouble for more than eight months before she saw fit to consult a physician about it. Then she went to Dr. Johnson for treatment and had been going to him for more than two weeks prior to the trial. But she failed to call as a witness either Dr. Johnson or the doctor who performed the operation at the hospital; and no reason is advanced for not calling them.

She also testified that before her injury she assisted her husband as a waitress in his restaurant; that since then she had not been able to do so, but was doing a part of the housework for her husband and four roomers; that she made the beds and swept, and that within the previous week she had done some cooking at the restaurant.

It seems to us that the testimony fails to show any such serious and permanent injury to appellee as will justify a verdict for \$2200. Therefore if appellee will, within twenty days from the filing of this opinion, remit \$700 from the judgment it will then be affirmed for \$1500. If a remittitur is not filed within that time the judgment will be reversed and the cause remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

Call + Co

abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 662³

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 14 1920 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



| | | |
|--------------------------|---|-------------------|
| HESTER NORTON, Appellee, |) | |
| | : | |
| v. |) | APPEAL FROM THE |
| | : | CIRCUIT COURT OF |
| MERLE NORTON, Appellant, |) | WINNEBAGO COUNTY. |

JONES P.J.

Appellee filed her bill for separate maintenance against appellant alleging their marriage on June 20th, 1921, and that they lived together until December 28, 1926, when appellant abandoned her without any reasonable cause; that shortly after the marriage, he began a course of cruel conduct toward her and persisted in it until the time of their separation; that he compelled her to participate in excessive sexual intercourse against her will; that she suffered from bladder trouble which was aggravated by his persistence in such indulgence, although he knew her health was thereby impaired; that he boasted of his illicit relations with other women and repeatedly told her that if she refused to accede to his demands, he would go with other women.

Appellant filed an answer denying the material allegations of the bill and also filed a cross bill for divorce, charging extreme and repeated cruelty. The cross bill was answered and the cause was heard by the chancellor.

During the special July term 1927, the court entered a decree on the original bill in favor of appellee, and dismissed the cross bill for want of equity. From that decree an appeal to this court was perfected by appellant. Afterward he confessed error; whereupon the decree was vacated and the appeal to this court was dismissed.

At the October Term of the circuit court, appellee applied for a new decree on the evidence theretofore taken. Appellant objected and moved the court to hear testimony to determine the rights of the parties as of that date rather

than as of the time of the first decree. The court denied the motion and rendered a decree in favor of appellee and dismissed appellant's cross bill for want of equity.

Permission to open a case for the purpose of taking further testimony rests in the sound discretion of the court, and action in that behalf will not be interfered with, except for clear abuse. (People v. St. L. I. M. & S. Ry. Co. 278 Ill. 25; Flynn v. City of Chicago 197 Ill. App. 580.) No showing was made that additional testimony would enlighten the court as to the issues; neither was it shown that appellant could not have procured the evidence on the original hearing, nor that there had been any change in the situation of the parties. In the absence of any such showing the court was not required to open the case for further evidence. (Patrick v. Perryman 52 Ill. App. 514; Smith v. Kelly 143 id. 640.)

By the decree it is provided that appellant shall pay appellee for her separate maintenance \$25 on July 1, 1928, and a like amount on the 1st day of each month thereafter until the further order of the court. The decree finds that appellant is 34 years of age and appellee about 26 years of age; that appellant has earned and is capable of earning \$2200 a year; that appellee has earned and is capable of earning from \$1,000 to \$1,200 a year. It adjusts and fixes the property rights of the parties. Certain premises owned by them as joint tenants had been sold under contract for deed. \$3710.73 of the purchase price was unpaid and was due in monthly installments of \$40 each. The decree orders that as such installments are paid, they shall be equally divided between the parties. It provides that they shall each retain their respective interests in other real estate owned by them, and their respective bank accounts. At the time the decree was entered, appellee had about \$900 in bank and appellant had about \$690. The decree further provides that appellee shall

[illegible]

retain as her own property the household furniture and furnishings.

Appellant contends that the court was without power to enter a decree providing for payments of alimony to begin at a future date. The separate maintenance statute (Chap. 68, Para. 22, Cahill's Revised Statutes) provides that married women, who without their fault live separate and apart from their husbands, may have their remedy for a reasonable support and maintenance while so living separate and apart. Decrees for separate maintenance do not ordinarily provide for payments to begin some considerable time in the future, but the statute fixes no time when such payments shall begin. Its object is apparent on its face, and courts will construe it to advance the remedy intended by the legislature. Its purpose is to confer jurisdiction upon courts of equity to enforce the common law duty of a husband to furnish support and maintenance for his wife, suitable to the condition of the parties in life. (Ross v. Ross 69 Ill. 569.) It is apparent that no hard and fast rule can be adopted which will fit the circumstances of every case. The allowance is to be determined by the exercise of the judicial discretion of the court, having reference to the condition of the parties in life, and the circumstances of the case. Courts of review will not interfere with the decision of the chancellor except in case of a clear abuse of that discretion. (Johnson v. Johnson 125 Ill. 510; Foote v. Foote 22 id. 425.)

Under the circumstances of this case, we believe that fixing the time for the first payment at a future date was no abuse of the discretion vested in the chancellor. The operation of the decree was not postponed by its terms. It found and decreed that appellee was entitled to live separate and apart from her husband. It merely deferred the payment of alimony until a date about six and one half months later. Appellant was not injured because the payments in question were not to begin immediately. The provision enured to his benefit

retain as her own property the personal belongings and household

effects which she has acquired by her own efforts.

To make a further provision for her own support and that of a future family. The separate maintenance statute of 1885, ch. 10, sec. 22, which has been amended by ch. 10, sec. 23, 1887, and ch. 10, sec. 24, 1888, provides that during the

marriage, when either party shall live separate and apart from the other, the husband shall be bound to support the wife and maintain the children in the same manner as if they were living together. The husband's duty is not limited to the support of the wife and children, but extends to the support of the family.

It is the duty of the husband to support the wife and maintain the children in the same manner as if they were living together. The husband's duty is not limited to the support of the wife and children, but extends to the support of the family.

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and he is in no position to complain. If for any reason the situation of the parties should change, the court has jurisdiction to readjust the matter of such payment upon a proper showing.

Appellant contends that appellee's income is more than is required for her needs and that the court was not justified in making any allowance to her. The amount of alimony to be allowed in a separate maintenance suit is to be determined in the same manner as in a case for divorce. The wife is entitled not merely to what necessity demands but what justice requires. Both husband and wife are first entitled to have their equities settled in the property held by both, jointly and separately. After the equities of the parties in the property are adjusted, then the husband should be caused to pay or not to pay a further sum for support and maintenance in money payments at stated intervals, according to whether or not the wife is equitably entitled to further payment after a consideration of all the facts that enter into a proper solution of that question. (Decker v. Decker 279 Ill. 300.) The misconduct of the husband is properly considered in fixing alimony. (Mussing v. Mussing 104 Ill. 126; Harding v. Harding 180 id. 481.) The amount, if any, to be allowed a wife for separate maintenance depends not only upon the question of the misconduct of the husband, but also upon the matter of their property and income, as well as their ages, health, past and present habits, social conditions and circumstances. (Gilbert v. Gilbert 305 Ill. 216.)

Appellee receives \$2.00 per month income from a savings deposit. The principal of the installment payments on the real estate sold by the parties is part of the corpus of the estate and should not be considered as income. Appellee testified that she was employed by the National Lock Company as an inspector; that she worked there about four years ago;

and he is in no position to complain. It is not his business to
interfere with the business of the estate, but he is entitled to
the same treatment as the other beneficiaries of the estate.

Appellant's contention that the estate is not
entitled to the same treatment as the other beneficiaries of the
estate is without merit. The estate is entitled to the same
treatment as the other beneficiaries of the estate. The estate
is entitled to the same treatment as the other beneficiaries of the
estate.

What Justice says is that the estate is not
entitled to the same treatment as the other beneficiaries of the
estate. This is not the case. The estate is entitled to the same
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is entitled to the same treatment as the other beneficiaries of the
estate.

that she commenced her last employment two weeks previous to the trial, and before that has worked as a nurse at a hospital six weeks for her room and board; that she had received training there about six years previously and it would require two years more for her to become a trained nurse; that she was earning about \$4.50 a day, sometimes less, having received \$36 for the thirteen days prior to the trial; that she had been sick during the spring, sometimes during that period earning \$5.00 or \$6.00 a week and at other times \$12 a week. She also testified that her room and board costs her about \$10 a week; that she pays \$6.75 per month storage on the furniture and that it takes from \$120 to \$200 a year to clothe her; that she is under a physician's care averaging two visits a week at \$2.00 per visit; that the tax and special tax on the lot owned by the parties is \$38 a year, and that her incidental expenses average 25¢ a week. There is no showing in the record that the payment of \$25 a month alimony will work any hardship on appellant, and we are of the opinion that the chancellor did not err in so fixing it.

The testimony on the question of whether or not appellee was living apart from appellant without her fault is in direct conflict. The chancellor saw and heard the witnesses and was in a better position than we are to form an opinion of the relative weight and merit of the testimony. Where the chancellor makes a finding of fact upon conflicting testimony heard by him, his finding will not be disturbed on review, unless it is manifestly against the weight of the evidence. (*Moneta v. Hoffman* 249 Ill. 56; *O'Donnell v. Snowden & McSweeney Co.* 318 id. 374.) We cannot say that the findings of the chancellor were so clearly and palpably erroneous as to require them to be set aside.

A fee of \$200 was allowed for appellee's solicitor, and appellant insists the evidence does not warrant it. The only testimony with reference to the amount of the fee was that of an attorney who had practiced at the local bar ten

The following is a list of the names of the persons who have been appointed to the various positions in the Department of the Interior, for the year 1900:

Secretary, J. H. Smith; Assistant Secretary, J. H. Smith; Chief Clerk, J. H. Smith; Deputy Chief Clerk, J. H. Smith; Chief of Bureau, J. H. Smith; Deputy Chief of Bureau, J. H. Smith; Chief of Division, J. H. Smith; Deputy Chief of Division, J. H. Smith; Chief of Office, J. H. Smith; Deputy Chief of Office, J. H. Smith; Chief of Section, J. H. Smith; Deputy Chief of Section, J. H. Smith; Chief of Branch, J. H. Smith; Deputy Chief of Branch, J. H. Smith; Chief of Division, J. H. Smith; Deputy Chief of Division, J. H. Smith; Chief of Office, J. H. Smith; Deputy Chief of Office, J. H. Smith; Chief of Section, J. H. Smith; Deputy Chief of Section, J. H. Smith; Chief of Branch, J. H. Smith; Deputy Chief of Branch, J. H. Smith.

years. The litigation was hypothetically described to him and he was asked to state his opinion as to what would be a fair, reasonable and customary fee to be allowed in such case. He answered "My opinion is \$200 would be the fee". No testimony was offered by appellant. The inquiry should be as to what is the customary fee in such cases. The court may take into consideration his own knowledge of the value of the services. We must assume that the chancellor did so. (Morrison v. Farmers Elevator Co. 319 Ill. 372.) What is here said also applies to appellant's objection to the allowance of \$100 solicitor's fee on this appeal.

The chancellor did not err in continuing the temporary injunction in force until the solicitor's fee for appellee's counsel were paid and until appellant had paid the costs and one-half the amount necessary to redeem from a tax sale certain property owned by the parties as joint tenants. Under Section 42 of the Chancery Act, a court has power to enforce payment of alimony by sequestration of real and personal property. (Wilson v. Smart 324 Ill. 283; Harding v. Harding 120 Ill. App. 389.) As the parties were joint tenants of the property, appellee could not redeem her interest by paying a portion of the amount due, unless the balance was also paid. We think it was within the discretion of the court to require appellant to pay one-half of the amount in order to protect appellee's rights in the property.

Finding no reversible error in the record, the decree is affirmed.

Decree affirmed.

years. The litigation was subsequently transferred to the
and we are glad to have the litigation now before you.
a fair, reasonable and equitable way to be settled in this
case. We propose that the parties to this suit be the
parties who are affected by the suit. The parties should be
as to what is the necessary fact in this matter. The parties
this case should be the parties to the litigation of the parties
services. We want to know what the necessary fact is. (Exhibit
V. Various matters to be litigated. The parties to this case
should be the parties to the litigation of the parties to this
litigation. The parties to this case should be the parties to this
litigation.

The litigation is now before you and we are glad to have the
information in this matter. The parties to this case should be the
parties who are affected by the suit. The parties should be
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services. We want to know what the necessary fact is. (Exhibit
V. Various matters to be litigated. The parties to this case
should be the parties to the litigation of the parties to this
litigation. The parties to this case should be the parties to this
litigation.

Respectfully,
The parties to this case should be the parties to this
litigation.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

Abstract
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 662⁴

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 21 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

MAY TERM 1928.

| | | |
|--------------------------|---|---------------------------------|
| LODEMA CLEM, | : | |
| Appellee, | : | |
| VS | : | APPEAL FROM THE |
| | | CIRCUIT COURT OF GRUNDY COUNTY. |
| WILLIAM A. JORDAN and | : | |
| ALVIN BALL, (Partners | : | |
| doing business as Jordan | : | |
| and Ball), WILLIAM A. | : | |
| JORDAN, | : | |
| Appellant. | : | |

Jett, J.

This is an appeal from a judgment in an action on the case for \$782.00 obtained by Lodema Clem, appellee, against William A. Jordan for personal injuries to her right leg which she sustained by falling through a stage floor owned by William A. Jordan.

For the purposes of this opinion appellee will be referred to as plaintiff and the appellant as defendant.

The declaration consists of two counts and charges that on October 15th, 1926, the defendants William A. Jordan and Alvin Ball owned a stage floor which they rented to the plaintiff for a medicine show and that it was the duty of the defendants to maintain the same in reasonable good, safe repair and condition, and reasonable suitable and safe for the plaintiff to walk over and upon in the selling of her medicines. The first count avers that the defendants suffered the stage to be and remain in a bad, unsafe condition, and certain of the boards to be and remain in a worn out and damaged condition which had existed for a long time and was known to the defendants or if they had been in the exercise of reasonable care would have been known to them. The second count charges that the defendants negligently suffered and permitted

MAY 1934

JOHN A. JORDAN

Appellant

VS

WILLIAM A. JORDAN and
KIMMY ELLIOTT (Intervenor)
Joint Appellees as Defendants
and WILLIAM A. JORDAN,
Defendant

Appellee

Left, 4.

This is an appeal from a judgment in an action on the case for \$75.00 obtained by John A. Jordan, appellant, against William A. Jordan for personal injuries to her right leg which she sustained by falling through a glass floor owned by William A. Jordan.

For the purpose of this opinion appeal will be

referred to as plaintiff and the appellee as defendant.

The declaration consists of two counts and alleges

that on October 15th, 1933, the defendant William A. Jordan and Alvin Ball owned a store floor which was placed in the plaintiff for a medicine show and that it was not safe at the time to maintain the same in the condition in which it was placed, and reasonable and prudent and also for the plaintiff to walk over and upon is the selling of her medicine. The floor was made of glass and the defendant entered the store to be and remain in a bed, under condition, and certain of the floor to be and remain in a safe and sound condition which had existed for a long time and was known to the defendant at the time she was in the store. It is alleged that the defendant negligently entered and remained

the stage floor to be constructed of defective boards not sufficiently braced and with joists too far apart for safe construction which was unsafe and dangerous so that a person walking across the stage was liable to break through, which condition was known or should have been known.

It is charged in each count that the plaintiff was in the exercise of care and caution for her own safety at the time she received her injury.

To the declaration the defendant Jordan pleaded the general issue. The defendant Ball pleaded the general issue and a special plea of non-ownership and control.

On the trial of the case it was disclosed that Ball was not interested in the stage floor, which was owned by the defendant Jordan, and Ball was dismissed out of the case.

The evidence shows that the plaintiff is a medicine vendor and travels from place to place selling medicines. She has a troop of performers and gives a free show in connection with her sales. Desiring to go to the town of Mazon she endeavored to get in touch with the owner or manager of the theatre building in said town. In her effort to do so she was put in communication by phone with the wife of the defendant Jordan. She testified that Mrs. Jordan said she was the manager of an opera house and would ascertain if it could be rented for the following week. She reported to the plaintiff that the opera house could be had for the week at a rental of \$20.00. The plaintiff proceeded to Mazon and met Mrs. Jordan and her husband who was the owner of the building in which the theatre was located on the second floor. A portion of the first story of the building was operated by Jordan and his son-in-law Ball as a store. They had goods stored on the opera house stage. When the plaintiff went to the town of Mazon she, in connection with Jordan, went to the opera house and the

the state that he is considered of sufficient importance
officially present and with which the state has some
relations which are usually and frequently in the nature of
the state the state was limited to these matters, which are
dishes was known or should have been known.

It is stated in each case that the plaintiff was
in the absence of case and admitted the case was entirely at the
time the plaintiff was injured.

To the defendant the defendant is not a party
the plaintiff is not a party. The defendant is not a party
and a special plea of non-jurisdiction was entered.

On the trial of the case it was claimed that the
was not interested in the state that, which was made by the
defendant's father, and that was admitted at the time.

The evidence shows that the plaintiff is a resident
within and travels from place to place within the state. The
was a party of the plaintiff and that a time when it was known that

the plaintiff is not a party of the state and that the plaintiff is
not a party with the state in connection with the plaintiff's father
and that. In the plaintiff's case he was not a party in connection with

of the state with the state of the defendant's father. The plaintiff
that the plaintiff is not a party of the state and that the plaintiff is
would ascertain if it could be proved that the plaintiff was not a party.

regarded to the plaintiff that the state was not a party to the
the state at a trial of \$100. The plaintiff is not a party to the
and that the plaintiff is not a party to the state and that the plaintiff is

plaintiff which the plaintiff was interested in the state that. The
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and the plaintiff is not a party to the state and that the plaintiff is

state was made. When the plaintiff was in the state of the
the, in connection with the state, was in the state and that the

plaintiff asked that the goods stored on the opera house stage be removed and her request was substantially complied with by moving some of the goods to the rear of the stage leaving enough room on the floor for the show and also for a table on which was placed the medicine to be sold. The evidence discloses that she started her sale on Monday and it ran each night thereafter until Friday night. On Friday night the plaintiff while going across the stage to the table where the medicine had been placed stepped into a hole or upon a weak plank letting her foot and leg go through to her knee or a little higher. She was so wedged in this hole that it was necessary to get a hatchet and split the board in order that she could have her leg removed. She was able to continue through the evening with the sales and appeared again the next evening. She had considerable pain thereafter and was compelled to go to a hospital to have her injuries treated.

It is the contention of the defendant, (1) that the defect in the stage floor was patent; (2) that the trial court should have directed a verdict for the defendant at the close of the plaintiff's evidence; (3) that the verdict is not according to the weight of the evidence; (4) that the trial court should have admitted in evidence the two parts of the board through which plaintiff fell; (5) that the relationship of landlord and tenant was not proved, and that therefore the defendant owed no duty to the plaintiff except not to wilfully injure her; and (6) that a prejudicial course of conduct was pursued by counsel for plaintiff.

It is the contention of the plaintiff that no question of law is raised on this appeal; that the question of fact concerning the latent defects of the board have been decided adversely to the defendant by the verdict of the jury and the judgment of the trial court; that the evidence of the plaintiff and the evidence of Duana Briant and the testimony of the defendant Jordan establishes a clear case of liability; that the evidence clearly showed a latent defect which was not controverted and that the

plaintiff stated that the goods placed on the table were removed and her request was substantially complied with by moving some of the goods to the rear of the table leaving enough room on the floor for the show and also for a table on which was placed the medicine to be sold. The evidence discloses that she started her sale on Monday and it ran each night thereafter until Friday night. On Friday night the plaintiff while riding across the street to the table where the medicine had been placed slipped down a hole or upon a weak plank falling on her head and her head was injured. She was so injured in this fall that it was necessary to get a doctor and apply the bandage in order that she could have her leg removed. She was also threatened through the evening with the knife and appeared under the most evening. She had considerable pain thereafter and was compelled to go to a hospital to have her injuries treated.

It is the contention of the defendant, (1) that the latest in the state that was passed; (2) that the trial court should have directed a verdict for the defendant as the case of the plaintiff's evidence; (3) that the verdict is not supported to the weight of the evidence; (4) that the trial court should have admitted in evidence the two parts of the book which the plaintiff fell; (5) that the relationship of the plaintiff and the defendant was not proved, and that therefore the defendant was not liable for the plaintiff's injuries; (6) that the plaintiff except not to admit the book and (7) that a prejudicial course of conduct was shown by the defendant.

It is the contention of the plaintiff that the law is raised on this case; that the defendant is liable for the latent defects of the book; that the defendant is liable for the defects of the book; that the evidence of the plaintiff and the defendant of the plaintiff and the testimony of the defendant is established a clear case of liability; that the evidence discloses a latent defect which was not anticipated and that the

Circuit Court was right and should be affirmed.

According to our view the main question presented in this cause and the one that is decisive thereof is whether or not the plaintiff had notice of the defective condition of the stage floor. She testified that the floor appeared to be rough when she first saw it and, as she expressed herself, it needed a shave. She denied having seen any holes in the floor although she knew the boards would spring some when she walked across the stage.

The record discloses that sometime before the plaintiff was injured a drayman had placed a piano upon the stage in question and in doing so the castor of one of the legs of the piano broke through the stage floor. When the piano was lifted up the board sprung back in place. Unless a person's attention was specifically directed to the plank it would not ordinarily be observed. It was on this broken board that plaintiff received her injury.

Taking the evidence altogether we are not prepared to say that the jury was not justified in bringing in the verdict in favor of the plaintiff. We think that she had no notice sufficient to acquaint her with the defective condition of the floor. We are also of the opinion that the defendant had actual notice or he should have known of the existence of the defect which actually caused plaintiff's injury because of the length of time between the breaking of the board when the piano was placed on the stage by the drayman and the injury of plaintiff was sufficient to give the defendant an opportunity to make repairs.

The defendant argues that the defect in the floor was patent and not latent. He does not deny that the plaintiff went through the stage floor where it was weak and would push down and then spring back in place so as not to be observable; that plaintiff sustained said injury; he does not deny that the declaration stated a good cause of action; that the jury were properly instructed nor does he claim that the damages awarded were excessive. The question as to whether or not the defect was patent and not latent was a question of fact and has been decided adversely

to the contention of the defendant by the jury and approved by the trial court.

The law is well established that the verdict of a jury will not be set aside on the ground that it is not supported by the testimony unless it is manifestly against the weight of the evidence.

The rule is well settled that the finding of a jury on conflicting evidence sustained by the trial judge will not be reversed on appeal. *Potter vs C.M. & St. Paul Ry. Co.* 208 Ill. App. 363; *City of Pana vs Baldwin*, 265 Ill. 119.

Furthermore the rule is that when the testimony is conflicting and that produced in behalf of the prevailing party is sufficient to justify the finding the verdict of the jury will not be disturbed by a reviewing court on the ground of insufficiency of evidence. *Alton Ry. Gas & Electric Co. vs Seiferth*, 95 Ill. App. 134; *Jennings vs Jennings*, 94 Ill. App. 72; *Goldring vs Chicago City Ry. Co.* 159 Ill. App. 87; *Kirlin vs Chittenden*, 176 Ill. App. 550.

The defendant says that the Court erred in refusing to admit in evidence the two sticks or parts of the board which he offered in evidence, when the defendant had testified that he had seen them before and that they made up the board that was on the floor, October 10th and which plaintiff fell through October 15th., and that it was in the same condition as on October 15th and that the two pieces showed the hole just as it was. The testimony was that the board was splintered and had been split with a hatchet. It was plainly impossible to produce the board, just as it was before the accident. These pieces were not taken at the time of the accident nor even preserved in the condition they were immediately following the accident but one of the pieces was found beneath the stage below where the accident occurred. The foundation was so plainly incomplete that there was no need to cross-examine.

We have examined all questions raised by the defendant and being of the opinion no reversible error was committed in the trial of this cause the judgment of the Circuit Court of Grundy County is affirmed.

Judgment affirmed.

to the satisfaction of the Government of the United States and the Government of the United Kingdom.

[illegible][illegible][illegible]

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court



abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the first day of May, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 662⁵

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 28 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

PAUL NIELSON, Appellee,)
 V.) Appeal from the
 THE AUTO OWNERS PROTECTIVE) Circuit Court of
 EXCHANGE, Appellant,) Grundy County.

Jones P.J.

Paul Nielson, appellee, recovered a judgment against The Auto Owners Protective Exchange for \$500 on a policy of insurance on account of damages to his automobile, alleged to have been incurred in a collision with another car. On the night of June 19, 1926, Nielson's son, Clark, accompanied by a young lady was driving his father's automobile north on a concrete road toward the City of Morris. According to his testimony, he was driving on the right hand side of the road, at a speed of about thirty miles an hour. There is a road running east from the concrete road, known as the Pine Bluff Road. Shortly before Nielson reached that road, he observed a car coming toward him on the concrete road. This car was driven by Charles Holmes, who was accompanied by Jasper Phillips. As the Holmes automobile got within a short distance of the Pine Bluff Road, it cut across the concrete road in front of Nielson.

About fifteen feet north of where the Pine Bluff Road runs east from the concrete road, there is a road which runs to the northwest from the concrete road. Nielson realized that a collision was imminent, by reason of Holmes' cutting across in front of him when the cars were in such close proximity. His first thought was to cross over to the west and take the road leading from the concrete road to the northwest. He saw that he could not do it and then attempted to pass the Holmes car on the left. The collision occurred. The Nielson car was carried west across the pavement, over the

Special Trial the
Circuit Court of
Greene County.

PAUL WILSON, Appellant,
v.
THE AUTO OWNERS PROTECTIVE
ASSOCIATION, Appellant.

James L. L.

Paul Wilson, Appellant, recovered a judgment against
 The Auto Owners Protective Association for \$500 on a policy of
 insurance on account of damages to his automobile, alleged
 to have been incurred in a collision with another car, on
 the night of June 19, 1935. Wilson's son, Paul, testified
 by a young lady was driving his father's automobile north on
 a concrete road toward the City of Morris. According to his
 testimony, he was driving on the right hand side of the road,
 at a speed of about thirty miles an hour. There is a road
 running east from the concrete road, known as the first Elbert
 Road. Shortly before Wilson reached that road, he observed
 a car coming toward him on the concrete road. This car was
 driven by Charles Wilson, who was accompanied by several
 friends. As the Wilson automobile got within a short dis-
 tance of the Elbert Road, it cut across the concrete
 road in front of Wilson.

About fifteen feet north of where the Elbert
 Road runs east from the concrete road, there is a road which
 runs to the northwest from the concrete road. Wilson testified
 that a collision was imminent, by reason of Wilson's driving
 across in front of him when the cars were in such close
 proximity. His first thought was to avoid only in the north-
 east into the road leading from the concrete road to the north-
 west. He saw that he could not do it and then observed the
 pass the Wilson car on the left. The collision occurred. The
 Wilson car was damaged west across the highway, near the

curb, and down into a deep ditch, where it turned over and struck two large rocks. The car was considerably damaged. The Holmes car was only slightly damaged.

The policy of insurance covers damages to the extent of \$1000 occasioned by collision, if such loss or damage is caused "solely by collision with the rolling stock of any public carrier, any vehicle or live stock now owned by, under the control of, or in the possession of the insured." It also provides that the Exchange shall not be liable for loss or damage if the insured automobile at the time the damage occurs is being operated or driven in violation of any law of the state in which the damage occurs.

While it is not expressly admitted by appellant that the collision occurred, the proof conclusively establishes the fact that it did occur substantially as described by the driver of the Nielson car. The occupants of both cars say they collided and no one disputes it.

It is the contention of appellant that there should be no recovery in this case unless the proof shows the collision was the sole cause of the damage sustained to the Nielson car. The court instructed the jury that if they believed the collision was the proximate cause of the damage to plaintiff's automobile, he would have a right to recover. No instruction was given requiring the collision to be the sole cause of the damage.

Counsel have presented at considerable length their respective views concerning the use of the words "sole" and "proximate". A large number of cases have been cited by each of them. In view of the undisputed facts in this record, we think it entirely unnecessary to review those citations. It is enough to say that while the sole cause is always the proximate cause of an injury, there are cases where the proximate cause may not be the sole cause. There may be intervening causes. In the case at bar, there were no intervening causes. The record indisputably shows that the proximate,

and down into a deep ditch, where it landed over and over again
two large rocks. The car was considerably damaged. The driver
can was only slightly injured.

The policy of insurance covers damages to the ex-
tent of \$1000 occasioned by collision, if such loss or damage
is caused "solely by collision with the motor vehicle of any
public carrier, any vehicle or live stock lawfully on the
highway, or in the possession of the insured." It also
provides that the insured shall not be liable for loss or damage
if the insured vehicle at the time the damage occurred is
being operated on a highway in violation of any law of the state
in which the damage occurred.

While it is not expressly admitted by the plaintiff that
the collision occurred, the proof conclusively establishes
the fact that it did occur substantially as described by
the driver of the Wilson car. The statements of both cars
say they collided and no one disputes it.

It is the contention of the plaintiff that there should
be no recovery in this case unless the proof shows the col-
lision was the sole cause of the damage sustained by the
Wilson car. The court instructed the jury that if they be-
lieved the collision was the proximate cause of the damage
to plaintiff's automobile, he would have a right to recover.
The instruction was given regarding the collision to be the
sole cause of the damage.

Counsel have presented an elaborate legal argument
respecting views concerning the use of the words "sole" and
"proximate". A large number of cases have been cited in
each of them. In view of the undisputed facts in this case,
we think it entirely unnecessary to review those authorities.
It is enough to say that while the sole cause is always the
proximate cause of an injury, there are cases where the
proximate cause may not be the sole cause. There may be
intervening causes. In the case at bar, there was no later
intervening cause. The record indisputably shows that the collision

sole and only cause of the damage to plaintiff's car was its collision with the Holmes car. The court may well have used the word "sole" instead of "proximate" in the instructions given to the jury, but no verdict could have been properly returned by the jury, except one in favor of the plaintiff.

Complaint is made that the instructions ignore paragraph 11 of the policy, which provides that appellant shall not be liable for any damage, if it occurs while the automobile is being driven in violation of any law of this state. There was no occasion to instruct the jury concerning this provision of the policy, because there is no evidence in the record even tending to show a violation of any law of this state. The instructions given by the court covered the law applicable to the case with substantial accuracy, and the court committed no error in the refusal of any instruction.

Counsel for appellee, in addressing the jury concerning a photograph in evidence said:-

"But this black, this dim, obscure picture is an attempt to perpetrate a fraud on you if ever there was one. If ever an insurance company tried to put over a fast one on a jury that are in their right mind, look at this picture and see if this isn't it."

This remark was objected to by counsel for appellant, and it is now urged that it was so inflammatory that it should cause a reversal of the judgment. We think the remark was out of place, but we do not regard it as sufficiently prejudicial to warrant us in awarding another trial of this cause. We are firmly impressed with the justice of the verdict and the judgment is accordingly affirmed.

Judgment affirmed.

The word "sole" imported in the instant case
evidence to the fact, but no written words were
referred to by the jury, except one in favor of the plaintiff.

Concluding it was held that the International League
represented it as the policy, which provided that
shall not be liable for any damage, it is hereby held that
the liability is being waived in relation to any law it may
enact. There was no intention to withdraw the law from
the law of the United States, because there is no
law in the United States which is a violation of the
law of this State. The International League is not
entitled to the law of the United States in the United
States, and the law of the United States is the law of the United
States.

Journal of the American Medical Association

— *Journal of Management Education* 25(1): 10-17, 2001.

1. The first step is to identify the problem.
 2. The second step is to define the problem.
 3. The third step is to analyze the problem.
 4. The fourth step is to develop a solution.
 5. The fifth step is to implement the solution.
 6. The sixth step is to evaluate the solution.
 7. The seventh step is to monitor the solution.
 8. The eighth step is to maintain the solution.
 9. The ninth step is to improve the solution.
 10. The tenth step is to document the solution.

1. The first of these is the fact that the
2. The second is the fact that the
3. The third is the fact that the
4. The fourth is the fact that the
5. The fifth is the fact that the
6. The sixth is the fact that the
7. The seventh is the fact that the
8. The eighth is the fact that the
9. The ninth is the fact that the
10. The tenth is the fact that the

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court



Abstract

AT A TERM OF THE APPELLATE COURT,

Second October

Begun and held at Ottawa, on Tuesday, the ~~first~~ day of ~~May~~, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 663'

BE IT REMEMBERED, that afterwards, to-wit: On

modified

Oct 2, 1928 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

| | | |
|-----------------|---|-------------------|
| Axel Nelson, |) | |
| Appellant, | : | |
| |) | Appeal from the |
| v. | : | Circuit Court of |
| |) | Willabago County. |
| William Bohlin, | : | |
| Appellee, |) | |

Jones P.J.

Axel Nelson, appellant, recovered a judgment before a Justice of the Peace against appellee William Bohlin for \$249.75. The cause was appealed to the circuit court, where a jury trial resulted in a verdict and judgment for appellee.

Appellee, Bohlin, was the owner of three adjoining city lots on Ethel Avenue in the City of Rockford, numbered respectively 1605, 1609 and 1615. Lot 1605 is at the corner of Oak Street and Ethel Avenue. Oak Street runs north and south and Ethel Avenue runs east and west. Appellant was a general teaming and grading contractor.

In April, 1925, there was a mound or knoll of dirt on Lots 1605 and 1609. Bohlin testified that he and Nelson agreed that the latter could have the top dirt from this knoll provided he would level the ground off afterwards, so that it could be seeded down if Bohlin did not build right away. On the other hand, Nelson testified that he was to have the dirt free for hauling it away, and that he was to be paid for the grading, but that no price was agreed upon for the work. He claims that there is due him \$99.90 for grading of Lots 1605 and 1609, and \$149.85 for grading on Lot 1615, making a total of \$249.75.

Later in the year Bohlin built a bungalow on each of lots 1605 and 1609. It is conceded that he employed Nelson to haul away the dirt from the cellar excavations of these

Appeal from the
Circuit Court of
Alameda County.

Arrel Nelson,
Appellant,
v.
William Bohlin,
Appellee.

James L. L.

Arrel Nelson, appellant, resorted to a program before a
jurisdiction of the Peace against appellee William Bohlin for \$247.75.
The cause was referred to the circuit court, where a jury trial
resulted in a verdict and judgment for appellee.

Appellee, Bohlin, was the owner of three adjoining
city lots on Ethel Avenue in the City of Berkeley, numbered
respectively 1603, 1604 and 1613. Lot 1603 is at the corner
of Oak Street and Ethel Avenue. Oak Street runs north and
south and Ethel Avenue runs east and west. Appellant was a
general teaming and grading contractor.

In April, 1932, there was a mound or knoll of dirt
on lots 1603 and 1604. Bohlin testified that he and Nelson
agreed that the latter could have the top dirt from this knoll
provided he would level the ground off afterwards, so that
it would be seeded down if Bohlin did not pull it away.
On the other hand, Nelson testified that he was to have the
dirt free for hauling it away, and that he was to be paid for
the grading, but that no price was agreed upon for the work.
He claims that there is due him \$77.90 for hauling of lots
1603 and 1604, and \$147.85 for grading on lot 1613, making
a total of \$225.75.

Later in the year Bohlin built a driveway on each
of lots 1603 and 1604. It is conceded that he employed Nelson
to haul away the dirt from the earlier excavations of these

two houses for a contract price of \$125. Shortly afterward the parties agreed that Nelson should cut down a bank on North Gardner Avenue. This latter work was known as the Eric Eekstrom job. Bohlin testified the price for this job was to be \$125, but Nelson claimed that it was to be \$150.

In August, 1926, Nelson owed the firm of Bohlin & Johnson, of which appellee was a member, an insurance bill of \$288.18. The firm made two checks of \$125 each to Nelson, which he endorsed and returned to them, together with his own check for \$38.18 in payment of the insurance bill. At the same time, after some argument, Bohlin agreed to pay Nelson \$25 more, and delivered a check for that amount the next day to Nelson's office and obtained a receipt for \$275, reading, "1925 and 6 grading & on the Eric Eekstrom job Ethel Av. & Oak St. Paid in full." The receipt was dated August 16, 1926. The only work which Nelson claims he did for Bohlin in 1926 is the grading of Lot 1615 in April and May of that year. It is to be observed that the receipt covers the years 1925 and 1926. Bohlin testified, without contradiction, that after Nelson had given him the receipt in full for his work he made no claim that any thing further was due him until Bohlin & Johnson pressed him for payment of another insurance bill. So far as shown by the record, all the work which Nelson did for Bohlin was performed before the receipt was given. Nelson offers no explanation why his claim, on which he afterward sued, was not then presented to Bohlin and included in their accounting. He not only omitted to present any such claim, but paid a net difference on his insurance.

Sometime in the latter part of 1925 Nelson dug a hole on the rear of Lots 1605 and 1609 about forty-five feet in diameter and from twelve to fourteen feet deep, extending four or five feet below the cellar floor of the houses. Bohlin testified that the hole was dug without his knowledge or consent; that Nelson promised to fill it and fix the lot up in good shape; that he left the job with a hole there and Bohlin

repeatedly asked him to fill it "because one of the foundations cracked from sliding the dirt to the bottom". Bohlin further testified that the material excavated from the hole was used by Nelson on North Highland Avenue, partly on the street and partly on Nelson's own lots; that after many requests, Nelson partially filled the hole in April, 1926, and that he, Bohlin, paid \$57.50 to another party for completing the job. It appears from Bohlin's testimony that the dirt used by Nelson to partially fill the hole was taken from Lot 1615; and at the time Nelson paid his insurance bill, he claimed he was entitled to \$25 for moving the dirt and was paid \$25 to settle an argument about it.

Nelson testified that the walls of the cellar excavations had caved in and that he dug the hole to have a place to put the dirt from the caved-in cellars. He advances no reason why he would dig a hole, such as the evidence shows, and haul the dirt away, merely to have a place in which to put the dirt from the adjacent caved-in cellars; or why the dirt from the caved-in cellars could not have been hauled away as easily and cheaply as he could dig such a hole, haul the dirt away and then refill the hole with the cellar dirt. He does not deny that the material excavated from the hole was used by him. It is difficult to understand why such a course would be pursued unless it was wholly for his own benefit. He does not claim that the contract for the removal of the cellar dirt contemplated the digging of any hole, or that the hole was dug with Bohlin's knowledge or consent. Under such circumstances it was his duty to refill it. The material from the caved-in cellar walls was not sufficient for that purpose, and apparently, the easiest place to procure the dirt was from Bohlin's adjoining lot. If he took the dirt from Lot 1615 for the purpose of filling the hole, he is not entitled to recover for doing it. The jury evidently took the view that he removed dirt

repeatedly asked him to fill it "because one of the investigators
avoided from climbing the first to the bottom". During the
testified that the material excavated from the hole was used by
Wilson on North Highland Avenue, partly on the street and
partly on Wilson's own lot; that after being repeated, he
partially filled the hole in April, 1932, and that he, Sohlis,
paid \$25.00 to another party for completing the job. It
appears from Sohlis's testimony that the dirt used by Wilson
to partially fill the hole was taken from the lot; and at
the time Wilson told his informant this, he claimed he was
entitled to \$25 for moving the dirt and was paid for the service
an amount about it.

Wilson testified that the walls of the cellar were
stone had saved in and that he had the hole to have a place to
put the dirt from the covered-in cellar. He refused to reason
why he would dig a hole, such as the evidence shows, and how
the dirt was, except to have a place to which to put the dirt
from the adjacent covered-in cellar; or why the dirt from the
covered-in cellar could not have been carried over an existing
and deeply as he told his informant, that the dirt was
and then refill the hole with the cellar dirt. He does not
deny that the material excavated from the hole was used by him.
It is difficult to understand why such a course would be taken
good unless it was wholly for his own benefit. It does not
appear that the defendant had the removal of the cellar dirt
contemplated the digging of any hole, or that the hole was
dug with Sohlis's knowledge or consent. Under such circumstances
it was his duty to refill it. The material from the covered-in
cellar walls was not utilized for any purpose, and apparently
the earliest place to remove the dirt was from Sohlis's adjacent
lot. If he took the dirt from this lot for any purpose
of filling the hole, he is not entitled to recover for doing
it. The jury evidently took the view that he removed dirt

from Lot 1615 for the purpose of filling the hole, and we are inclined to think that the evidence warranted that conclusion.

Appellant urges that the verdict of the jury is against the manifest weight of the evidence. The testimony is conflicting in almost every material particular, but when all of the attending circumstances, as shown by the record, are considered, the evidence is amply sufficient to sustain the verdict, and we would not be justified in reversing the judgment because of appellant's contention.

He further claims that the Court erred in giving appellee's first, second and third instructions. The first told the jury that, if they believe from the evidence, Nelson accepted \$275 in full settlement of the account between him and appellee for all labor performed by him then they should find the issues for appellee. There is no error in this instruction.

The second instruction advised the jury that appellant cannot recover from appellee for excavating gravel on the premises in question and using the same for his own use, unless there was an express agreement between the parties to that effect, and if the jury believe from the evidence that appellant made excavations and took out gravel for his own use, without the consent of appellee, they should disallow any claim made by appellant for filling and grading the premises, if they believe such filling and grading was caused by the act of appellant without appellee's consent. While this instruction is somewhat inartistically drawn, we see no serious objection to it. Appellant had no right to remove gravel from appellee's lot for his own use unless he had permission; and if he performed labor in restoring the property to the condition it was in originally he cannot recover for his services.

The third instruction relates to the credibility of the witnesses and the weight of their testimony. Appellant

insists that it is erroneous in not referring to the number of witnesses. The reasons advanced for this objection have no application to this instruction. It does not undertake to define the term "preponderance of the evidence" but merely instructs the jury as to the weight and credit they should give to the witnesses testifying. Similar instructions were held proper in *Pressed Steel Car Co. v. Herath* 110 Ill. App. 596, and *City of LaSalle v. Kostka* 190 Ill. 130.

Finding no substantial error in the record, the judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

Case 100

Albany
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 663²

BE IT REMEMBERED, that afterwards, to-wit: On

OCT 11 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

| | | |
|-------------------------------------|---|------------------|
| Hugh W. Hughes, Defendant in Error, |) | |
| | : | |
| v. |) | Error to the |
| | : | Circuit Court of |
| Walter M. Pratt, Nellie E. Pratt, |) | Boone County. |
| Harvey Madison, Albert E. Loop, | : | |
| First National Bank of Mendota, |) | |
| Illinois, First National Bank of | : | |
| Earlville, Illinois, and Willis A. |) | |
| Martin, | : | |
| Plaintiff in Error, | : | |

Jones P.J.

Hugh W. Hughes filed his bill to the April Term, 1924, against Walter M. Pratt, Nellie E. Pratt, Harvey Madison and Albert E. Loop, to foreclose a trust deed on 215 acres of land in Boone County. The trust deed was given to secure an indebtedness of the Pratts to Hughes in the sum of \$29,200. On May 2, 1924, the Pratts entered their appearance but did not then answer the bill, and were defaulted. A decree was ordered but was not presented until September 2, 1924, when it was ordered to be filed "as of May 2, 1924." On June 28, 1924, the Pratts filed an answer to the bill, without having the default against them set aside or obtaining leave to answer. However, the decree which was entered in September recites that the cause came on to be heard upon the bill of complaint, and upon the answer of the Pratts.

On May 2, 1924, the day the default was entered, the trust deeds and notes were introduced in evidence. Oral testimony was heard and all evidence was duly certified by the chancellor. The right of redemption from foreclosure of the trust deed was controlled by the statute of July 1, 1917, relating to redemptions. The decree found that there was \$31,078.12 due upon the notes and directed that upon failure to redeem, a sale be made fifteen months from the date of the certificate of indebtedness issued by the master. On April 27, 1925, a stipulation was entered into between Hughes and the Pratts extending the time in which the Pratts might redeem, until

Report to the
Circuit Court of
Boone County.

Walter W. Wright, Defendant in Error,
v.
Walter W. Wright, Nellie E. Wright,
Harvey E. Wright, Albert E. Wright,
First National Bank of Chicago,
Illinois, Trustee of the
Estate of Albert E. Wright,
Illinois, Plaintiff in Error.

James P. J.

Walter W. Wright filed his bill in the Circuit Court, 1924,
against Walter W. Wright, Nellie E. Wright, Harvey E. Wright and
Albert E. Wright, to foreclose a trust deed on his estate of land
in Boone County. The trust deed was given to secure an in-
debtedness of the estate to Wright in the sum of \$25,000. On
May 8, 1924, the Wrights entered their appearance but did not
then answer the bill, and were defaulted. A decree was entered
but was not presented until September 2, 1924, when it was
ordered to be filed "as of May 8, 1924." On June 12, 1924,
the Wrights filed an answer to the bill, without having the
default against them set aside or obtaining leave to answer.
However, the decree which was entered in September recites
that the case came on to be heard upon the bill of complaint,
and upon the answer of the Wrights.
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trust deed was established by the statute of July 1, 1917, relat-
ing to redemptions. The decree found that there was \$25,000.00
due upon the notes and directed that upon failure to redeem,
a sale be made fifteen months from the date of the certificate
of indebtedness issued by the master. On April 27, 1925, a
stipulation was entered into between Wright and the Wrights
extending the time in which the Wrights might redeem, until

June 28, 1925. On October 8, 1925, the original bill of complaint was amended making the First National Bank of Mendota, the First National Bank of Earlville, and Willis A. Martin parties defendant. The First National Bank of Earlville and Martin were defaulted. The First National Bank of Mendota answered, and on March 4, 1926, filed its cross bill to foreclose a junior mortgage held by it for \$2,000 on the premises in question.

On February 13, 1926, the decree for foreclosure was vacated and set aside on motion of the First National Bank of Mendota. On March 20, 1926, the latter order was also vacated and set aside. Leave was given the original complainant to amend the decree by adding to the description of the land its proper township and range numbers which had been omitted.

On April 15, 1926, the certificate of indebtedness, issued by the master, was amended by adding the omitted township and range numbers. Endorsed on the order allowing such amendment appears the written approval of the attorney for the Pratts. On the same day, April 15, 1926, a decree of foreclosure under the bank's cross bill was rendered. This decree contains the following:

"And now again on this same day, this cause coming on to be heard upon the bill of complaint of said Hugh W. Hughes and upon the cross bill of the said cross complainant, First National Bank of Mendota, Illinois, and the answers of the said cross defendants Hugh W. Hughes, Walter M. and Nellie E. Pratt."

The decree on the cross bill finds that the premises are scant security for the indebtedness due Hughes and the First National Bank of Mendota and continues the receivership ordered by the original decree. It orders that the cross defendants Walter M. Pratt, Nellie E. Pratt, First National Bank of Earlville, Illinois, Willis A. Martin as trustee, Harvey Madison, Albert E. Loop or some of them pay to the cross complainant the sum of \$2,255.33, within thirty days thereafter, with lawful interest and the costs, and also to pay

June 17, 1933. On October 3, 1933, the original bill of
the First National Bank of Chicago was amended making the First National Bank of
the First National Bank of Chicago, and Willie A. Smith, and
the defendant. The First National Bank of Chicago
was amended. The First National Bank of Chicago
was amended. On June 1, 1933, the cross bill to
close a junior mortgage held by it for \$2,000 on the premises
in question.

On February 1, 1933, the answer for foreclosure
was amended and set aside on motion of the First National Bank
of Chicago. On March 2, 1933, the answer was amended
and set aside. Leave was given the original defendant
to amend the decree by adding to the description of the land the
proper township and range numbers which had been omitted.
On April 12, 1933, the bill of foreclosure
was amended by adding the correct township
and range numbers. Answered on the order allowing amendment
ment appears the written approval of the attorney for the trustee.
On the same day, April 12, 1933, a decree for foreclosure was
the bank's cross bill was rendered. This decree contains the
following:

"And now again on this same day, this court
coming on to be heard upon the bill of foreclosure
of said bank & trustee upon the cross bill
of the said cross defendant, First National
Bank of Chicago, Illinois, and the trustee
of the said cross defendant, Willie A. Smith,
Robert A. and Willie A. Smith."

The answer on the cross bill filed by the defendant
was amended for the indebtedness the trustee and the
First National Bank of Chicago and contains the following
ordered by the original decree. It orders that the cross
defendant, Robert A. Smith, Willie A. Smith, First National
Bank of Chicago, Illinois, Willie A. Smith as trustee,
Robert A. Smith, Albert E. Smith as joint and several debtors
repay the sum of \$2,000.00, with interest and costs to pay
them, with lawful interest and the costs, and also to pay

Hugh W. Hughes the sum of \$31,178.12 due him on May 2, 1924, as fixed and determined by the decree of that date, and to pay him such other sums as may be due and owing under said decree of May 2, 1924. The decree further orders that in default of said payment being made as aforesaid, the mortgaged premises be sold according to the decree entered on May 2, 1924 and according to the law of 1921. It further orders that the defendants to the original bill, as amended, and all persons claiming under them or any of them, since the commencement of the suit be forever barred and foreclosed from all equity of redemption in and to the mortgaged premises, if the same are not redeemed within twelve months from the date of sale; and that if the mortgaged premises are so redeemed, the purchaser at such sale shall convey the same to the party so redeeming.

The decree concludes with the recital, "This decree is to be taken as and is supplementary to the decree entered in this cause on May 2, 1924." By the decree the master was directed to report to the court immediately at the expiration of the period of redemption, whether or not redemption had been made, and the cause was continued for that purpose. On June 8, 1926, the master made sale of the real estate to Hughes for \$33,159.90, being the amount due him at that time. On June 27, 1927, the master reported that no redemption from the sale had taken place, and a decree was entered that the deed from the master to Hughes should be a valid and binding conveyance and barring all the rights of the defendants.

This cause comes here on a writ of error prosecuted by Walter M. Pratt and Nellie E. Pratt. They filed a motion for a rule on all the other parties except Hughes to join in error or be severed forthwith. The First National Bank of Mendota, Illinois, obtained leave to join in error and a severance as to all other cross defendants, except Hughes, was allowed.

which W. Thomas was one of \$11,175.12 was paid on May 2, 1934, as found and determined by the Service of that date, and he paid him such other sums as may be due and owing under said decree of May 2, 1934. The further Thomas should pay to the Service of said payment before said date as determined, the said Thomas promises to pay according to the Service's decision on May 2, 1934, and according to the law of 1931. It further states that the defendant to the original bill, as amended, and all persons claiming under him or any of them, since the commencement of the suit be forever barred and prevented from all equity of redemption in and to the subject property, if the same are not released within thirty days of the date of said order; that if the aforesaid property are so released, the instrument at said date shall remain in force to the party so releasing. The Service concludes also that the said "Title" is to be taken as and is a confirmation to the Service's decision in this matter on May 2, 1934. By the Service the matter was referred to report to the court immediately, at the expiration of the period of redemption, without or without extension and from said date, and the same was confirmed on that property. On June 2, 1935, the master made sale of the real estate to James for \$25,125.00, being the amount due him at that time. On June 27, 1937, the master reported that he had received from the said and said James, and a letter was written that the said from the master be released should be a bill and filing of mortgage and paying all the rights of the defendant. This cannot stand on a bill of error presented by Walter H. Davis and William E. Davis. They filed a motion for a writ on all the other parties except James to join in error or be reversed together. The Court granted writ of Habeas, Illinois, against James to join in error and a reversal as to all other parties defendant, except James, was allowed.

It is claimed by plaintiff in error that the evidence upon which the decree of April 15, 1926, was rendered is not preserved by a certificate of evidence or by findings of fact contained in the decree. There appears in the record a certificate of evidence signed by the presiding judge, filed with the Clerk of the Court on May 2, 1924. In the additional record supplied by defendant in error is a certificate of evidence signed by the presiding judge and filed on April 15, 1926, each of which purports to contain all the evidence produced upon the respective hearings, and they severally embrace the notes, mortgage and trust deed in controversy. We think the record in this regard is sufficient to sustain the decree.

In the decree of April 15, 1926, the court used the word "southeast" instead of the word "southwest" in the description of one tract of land, but at all other places in the decree in describing the same tract, the word "southwest" is correctly used, and it is apparent that the use of the word "southeast" was merely a clerical error and no injury resulted to plaintiffs in error therefrom.

The chief insistence of plaintiffs in error is that they should have been allowed twelve months after April 15, 1926 for redemption from the Hughes trust deed. They contend that the decree entered on May 2, 1924, was vacated and that the period of redemption began with the sale under the decree upon the cross bill. It is true that an order was entered setting aside the original decree, but that order was itself set aside, and the decree of April 15, 1926, expressly recites that it is supplemental to the decree of May 2, 1924. The Pratts made no objection to any of the proceedings, but to the contrary, gave their written approval to the amendment ~~part of~~ the certificate of indebtedness on April 15, 1926.

The decree of May 2, 1924, was not a nullity as to the Pratts and is binding upon them. (Cutter, et al v. Jones 52 Ill. 84; Alsop v. Stewart 194 id, 595; Taylor v. Adams 115 id. 570;

It is claimed by plaintiff in error that the evidence

upon which the decree of April 12, 1934, was rendered is not

preserved by a certificate of evidence or by findings of fact

contained in the decree. There appears in the record a certificate

of evidence signed by the presiding judge, filed with the clerk

of the court on May 2, 1934. In the additional record supplied

by defendant in error is a certificate of evidence signed by

the presiding judge and filed on April 12, 1934, each of which

purports to contain all the evidence produced upon the respective

hearings, and each severally contains the notes, answers and

first deed in controversy. We think the record in this regard

is sufficient to sustain the decree.

In the decree of April 12, 1934, the court used the

word "severalty" instead of the word "jointly" in the description

of one tract of land, and in all other places in the de-

crees in describing the same lands, the word "severalty" is con-

stitutively used, and it is apparent that one use of the word

"severalty" was merely a clerical error and no injury resulted

to plaintiff in error therefrom.

The effect of the decree of plaintiff in error is

that the decree should have been allowed twelve months after April

12, 1934 for redemption from the United States land. That

content that the decree ordered on May 2, 1934, was vacated

and that the period of redemption began with the date when

the decree from the court was filed. It is true that an order

was entered setting aside the original decree, but that order

was itself set aside, and the decree of April 12, 1934, re-

mainly recites that it is unimpaired by the decree of May 2,

1934. The decree made no reference to any of the proceedings

but to the contrary, was validly entered upon the record

The decree of May 2, 1934, was not a nullity as it was

issued and is binding upon the parties. (Cotton, et al. v. Jones et al.,

64; Alford v. Stewart 194 Ill. 478; Coffey v. Adams 125 Ill. 400)

Rodman v. Quirk 211 id. 546.) But that decree was not binding on the subsequent mortgagees or a subsequent grantee, who had not been made parties. Such parties had a right to redeem. Their equity of redemption was not cut off by the decree of May 2, 1924. Their right to redeem was the same as though that decree had not been rendered. (Alsup v. Stewart, supra; Becker, et al v. Fink 206 Ill. App. 218; Rodman v. Quick, supra; O'Dell v. Levy 307 Ill. 277.)

The time allowed the Pratts by law for redemption under the decree of May 2, 1924, and the further time for redemption granted by the stipulation of the parties, had both long expired before the decree of April 15, 1926, was entered. Under the statute governing the mortgage to the bank, the Pratts had a period of twelve months from the time of sale thereunder in which to redeem. This period was allowed by the terms of the decree, which also gave them not only thirty days in which to pay Hughes' indebtedness under the original decree entered May 2, 1924. The Pratts are in no position to complain of either of the decrees entered in this cause. By the decree of April 15, 1926, the First National Bank of Mendota had twelve months in which to redeem from the Hughes' trust deed. The decree was entered on their cross bill, and it nowhere appears from their cross bill, or otherwise, that they desired to redeem the premises from the lien of the Hughes trust deed. No objection was made by the First National Bank of Mendota or the Pratts to the entering of the decree of April 15, 1926. The premises were sold for \$33, 159.90, and the decree found they were scant security for the indebtedness. The record shows many irregularities, but we are of the opinion that none of plain-tiffs in error were prejudicially affected hereby. Equity looks to the substance rather than to the form. We are of the opinion that the decree of the circuit court should be affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in
and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

Abstract

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 663³

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:



NATHAN H. WEISS, Appellee, :
: Appeal from the Cir-
v. :
: suit Court of
: Peoria County.
NATHAN SOLOMON, Appellant, :

Jones P.J.

Nathan H. Weiss, appellee, instituted suit for \$1733.50 against the appellant Nathan Solomon and recovered a judgment for \$925. The declaration consists of the common counts. An affidavit of claim, filed therewith, stated that \$500 of the demand was for money loaned and that the balance was due for legal services and interest. Solomon pleaded the general issue and a discharge in bankruptcy. His pleas were accompanied with an affidavit of defense setting up his discharge in bankruptcy, and that an allowance had been made in that proceeding on plaintiff's claim for fees.

It is conceded that when the petition in bankruptcy was filed, Solomon owed Weiss \$900 for legal services and for money loaned. Weiss testified that prior to the filing of such petition, Solomon promised to pay this indebtedness; that it was further agreed that Weiss should file his claim in bankruptcy and whatever dividends were received should be applied on the indebtedness; that Solomon requested Weiss to act as his attorney in the bankruptcy matter and agreed to pay Weiss \$500 for such services; and that several times thereafter Solomon renewed his promise to pay.

Solomon testified that he never agreed to pay Weiss an attorney fee of \$500 in the bankruptcy matter and that at no time did he agree to pay the amount which he owed Weiss prior to the filing of the petition.

He urges that a confidential relationship existed between him and Weiss and that the burden rests upon Weiss to

WATKIN S. WILKINSON, Appellant,
v.
WATKIN S. WILKINSON, Appellee,
A Trial Court of
County of
State of

Jones T. L.

Nathan M. Weiss, Appellant, Intervenor and
\$1500.00 against the appellant Nathan M. Weiss and
a judgment for \$1500.00. The decision was made of the common
counts. An affidavit of debt, filed herewith, states
that \$500 of the demand was the amount of the balance
balance was due for legal services and interest. The
pleaded the general issue and a discharge in bankruptcy.
His pleas were accompanied with an affidavit of debt
setting up his discharge in bankruptcy, and that an affi-
davit had been made in that proceeding on the basis of
for fees.

It is conceded that when the petition in bankruptcy
was filed, \$1500.00 was due to the legal services and for
money loaned. Weiss testified that prior to the filing of
such petition, \$1500.00 was due to him for legal services; that
it was further agreed that Weiss should file his claim in
bankruptcy and whatever dividends were received should be
applied on the indebtedness; and \$1500.00 was received
to act as his attorney in the bankruptcy matter and agreed
to pay him \$500 for such services; and that several times
thereafter \$1500.00 was received and the balance was paid.
\$1500.00 testified that he never agreed to pay
Weiss an attorney fee of \$500 in the bankruptcy matter and
that at no time did he agree to pay the amount of \$500
owed Weiss prior to the filing of the petition.
He urges that a confidential relationship existed
between him and Weiss and that the balance was due Weiss for

show that he had fully informed Solomon of his rights in the premises and that the agreement was fair and equitable. It is not claimed in Solomon's pleadings, or in his affidavit of defense, or even in his testimony, that Weiss had acquired any advantage by reason of any fiduciary relationship. No such issue was presented to the trial court. Such a defense cannot be first raised in a court of review. The mere fact that there is evidence in the record which is capable of sustaining a tenable theory of a party, is no ground for a reversal of a judgment, unless it can be seen that the point sought to be made here was in fact litigated in the trial court. (Stevens v. Partridge 109 Ill. App. 486.)

A discharge in bankruptcy will not afford a defense to a debtor if he thereafter promised to pay the indebtedness on which suit is brought. (Marshall v. Tracy 74 Ill. 379; Stern v. Smith & Company 225 id. 430.) A discharge is not a debt paid, as the moral obligation remains and is held by all the authorities to be a sufficient consideration for a new promise. The debt is due in conscience though discharged in law. This moral obligation, uniting with a subsequent promise by the bankrupt, to pay the debt, gives a right of action. The only effect of a discharge in bankruptcy is to suspend the right of action against the bankrupt in person. It does not annul the original debt of the debtor. (Stern v. Smith & Company supra.) There is nothing unfair or improper in a bankrupt promising to pay such an indebtedness as the record shows in this case, especially so as he requested Weiss to represent him in the bankruptcy matter.

Solomon also testified that nothing was said between him and Weiss about handling the Weiss claim any differently from any other claim; that he never promised at the time the petition was filed, or thereafter, to pay Weiss, but told him he would not "assume any responsibility prior to the bank-

show that he had fully informed defendant of the nature of the
promises and that the agreement was made with full knowledge of
its not being in defendant's interest, or in the interests of
defendant, or even in his testimony, that there was no agreement
any advantage by reason of any testimony, or otherwise.
Such issue was presented to the jury and they found a verdict
cannot be first raised in a court of law. The law is that
that there is evidence in the record which is sufficient to
establish a terrible wrong of a kind, as we know from
reversal of a judgment, unless it can be seen that the
point sought to be made here was in fact admitted in the
trial court. (Stevens v. Stevens, 101 Ill. App. 2d 111.)
A discharge in bankruptcy will not affect a
debtor to a debtor if he has received property or has an
interest in property on which such is present. (Stevens v. Stevens,
101 Ill. App. 2d 111; 374 Ill. 2d 111, 374 Ill. 2d 111.)
Discharge is not a debt paid, as the court said in the
main and is held by all the authorities to be a discharge
consideration for a new promise. The debt is not in the
debtor though discharged in law. This court said in
uniting with a subsequent promise in the bankruptcy, it
pay the debt, gives a right of action, the only effect of
a discharge in bankruptcy is to suspend the right of action
against the bankrupt in person. It does not affect the
original debt of the debtor. (Stevens v. Stevens, 101 Ill. App. 2d 111.)
There is nothing which is required in a discharge
right promising to pay such an indebtedness as the court
shows in this case, especially as the defendant failed to
represent his in the bankruptcy matter.
Solomon also testified that defendant was told by him
his and wife about making the same claim and that
from any other claim; that he never promised to the plaintiff
petition was filed, or transferred, to pay the debt, and that
him he would not assume any responsibility for the same.

ruptcy". On the other hand, Weiss testified that Solomon told him that if collection was attempted, he would deny he ever promised to pay. Solomon did not deny this testimony. It is apparent that he fully knew his rights and it is inconsistent for him to say that he made no promise to pay, and then claim he was not advised as to his rights concerning his promise to pay. He is in no position to contend that Weiss should have advised him as to his rights. It is apparent from the record that he knew them. Weiss was under no obligation to give Solomon information which the latter already possessed.

Weiss and Solomon were the only witnesses who testified. It is urged by Solomon that plaintiff, therefore, failed to make out his case by a preponderance of the evidence. A preponderance of the evidence does not necessarily depend upon the number of witnesses. One witness may affirm a fact and another deny it, and yet the weight of evidence may be clearly on one side. Facts may exist which will turn the scale on one side, -- interest, motive, prejudice, or manner of testifying. These, or other kindred things, are to be considered in determining which of two witnesses in the case is entitled to greater credit. (Boylston v. Bain 90 Ill. 283.)

Solomon admits that he owed Weiss \$900 at the time the bankruptcy proceeding was instituted. He employed Weiss as his attorney in that matter. He testified that Weiss agreed to represent him for a fee of \$125. Whether an attorney would be willing to wipe out a debt of \$900 due him in order to receive a promise of a fee of \$125 for services to be performed, was a circumstance to be considered by the jury in testing the credibility of the witnesses.

Solomon testified that when the bankruptcy proceeding was instituted, he paid Weiss \$50 in cash to apply on his fee in that matter. He produced no receipt. In the schedules filed in the bankruptcy proceeding, signed and sworn to by him, it is stated that no amount had been paid to counsel

"truth". On the other hand, when called and asked to
 tell him that if collection was attempted, he would pay, he
 ever promised to pay. Defendant did not want this money.
 It is apparent that he really knew his situation and he
 stated for him to say that he made no promise to pay, and this
 claim he was not advised as to his rights concerning his liability
 to pay. He is in no position to state that he would have
 advised him as to his rights. It is apparent from the record
 that he knew them. There was no collection in this
 case on information which the jury already possessed.
 Weiss and defendant were the only witnesses who testi-
 fied. It is urged by defense that defendant, through his
 to make out his case of a prearrangement in the witness. A
 prearrangement of the evidence does not necessarily depend upon
 the number of witnesses. The witness may witness a fact and
 another deny it, and yet the weight of evidence may be clearly
 on one side. There may exist other facts which may be clearly
 side, -- interest, motive, prejudice, or some of these things.
 These, or other kindred things, are to be considered in
 determining which of two witnesses in the case is entitled
 to greater credit. (Hoyt v. State, 111 Ill. 231.)
 Defendant states that he paid Weiss \$100 as the
 time the bankruptcy proceeding was instituted. He testified
 Weiss as his attorney is that witness. He testified that
 Weiss agreed to represent him for a fee of \$100. Weiss
 an attorney would be willing to give him a loan of \$100 and
 him in order to receive a payment of \$100 of him for the
 vices to be performed, and a statement to be submitted
 by the jury in finding the credibility of the witnesses.
 Defendant testified that when the bankruptcy proceeding
 was instituted, he paid Weiss \$100 in cash in 1934 and in 1935
 in that amount. He promised to pay. In the meantime
 filed in the bankruptcy proceeding, Weiss and Weiss as to
 also it is stated that an account was given to Weiss

for services rendered or to be rendered. He also testified that the schedules were not filled out when he swore to them, but admitted on cross examination that the word "none" was then on the schedule as his answer to the interrogatory relating to his payment of attorney's fees. He testified that he signed and swore to the schedules in the office of Weiss. The verification appears to have been made before Mary Keil, a notary public. Weiss testified, and it is not disputed, that she was a stenographer in the office of an insurance company and was never employed in his office; that Solomon signed and swore to the schedules before Miss Keil in the office of the insurance company.

Solomon denied that he ever heard of the item of \$500 charged against him as an attorney's fee in the bankruptcy proceeding until the morning of his testimony. But he admitted on cross examination that when the bill of particulars was filed some months before the trial, he knew of that claim. We are of the opinion that the jury was fully warranted in finding the verdict they did.

Complaint is made that the 9th instruction given on behalf of Weiss omitted any reference to the relation of attorney and client. No issue based on that relation was set up in Solomon's affidavit of defense or presented to the trial court. No evidence was introduced tending to raise such an issue and there was no occasion to embody it in the instruction. The case was not tried upon any such theory and it is too late now to advance it. (Hafner v. Herron 165 Ill. 242; Stevens v. Partridge 109 Ill. App. 486.) The jury was amply and correctly instructed.

During the argument to the jury, objections were sustained to some remarks made by counsel for Weiss. It is claimed they were so prejudicial as to require a reversal of the judgment. The verdict seems to us to be just and the size of it indicates that the jury did not act from prejudice or

for services rendered or to be rendered. He also testified that the schedule was not filed and was not to be filed but added on some other date and the same was filed on the schedule as the answer to the interrogatory relating to the payment of attorney's fees. He testified that he signed and swore to the schedule in the office of John. The verification appears to have been made before him with a notary public. This schedule, and it is not disputed, that there was a statement in the office of the insurance company and was never explained to him either; that schedule signed and swore to the schedule before him and in the office of the insurance company.

Johnson testified that on or about the 1st of \$3000 charged against him in the schedule for the insurance proceeding shall be the making of his testimony. He testified on cross examination that when the bill of particulars was filed some weeks before the trial, he knew of that date. He said at the trial that the fact was that contained in finding the verdict that all.

Johnson is also that the 1st schedule given on behalf of John and referred to the schedule of attorney and client. He testified on cross examination that set up in Johnson's affidavit of defense as introduced to the trial court. In evidence was introduced nothing to make even an issue and there was no question as to what it is an instruction. The case was not tried until after the trial and it is too late now to submit it. (Johnson v. Brown 191-111. See Johnson v. Brown 191-111. 191-111. 191-111. The fact was easily and correctly established.

During the argument of the jury, Johnson was maintained as a witness made it known that the witness in the trial was not permitted to be sworn a juror of the jury. The verdict seems to me to be that the jury of it believed that the fact was that Johnson was

passion. We cannot say that the effect of the argument was so prejudicial as to require a reversal. (Aetitus v. Spring Valley Coal Co. 246 Ill. 32.)

The judgment of the trial court is affirmed.

Judgment affirmed.

1. The first part of the report is a general statement of the purpose of the study and the objectives of the investigation. It also includes a brief review of the literature on the subject.

1.00 .111 .13 .05 1000 1000

[illegible]

LEWIS, J. T. 1993. *Journal of Fish Biology* 43: 1099-1107.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

Hyatt
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 663⁴

BE IT REMEMBERED, that afterwards, to-wit: On
OCT 11 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

Abstract
6901a
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 663⁴

BE IT REMEMBERED, that afterwards, to-wit: On
OCT 12 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

May Term, 1928.

| | | |
|------------------------|---|--------------------------|
| ✓ ROBERT PEACOCK | : | |
| APPELLEE. | : | |
| | : | |
| V S | : | APPEAL FROM THE CIRCUIT |
| | : | COURT OF McHENRY COUNTY. |
| ✓ THE FOX VALLEY COACH | : | |
| LINE, A CORPORATION. | : | |
| APPELLANT. | : | |

JETT, J.

This suit was instituted by Robert Peacock, appellee, in the Circuit Court of McHenry County, against the Fox Valley Coach Line, a corporation, appellant, to recover damages for personal injuries to himself, and injuries to his horse and carriage, occasioned by the alleged negligence of the appellant.

The declaration consists of two counts. The first charges general negligence. The second charges that the appellant drove its said motor bus at a greater rate of speed than was reasonable and proper having regard for the traffic and the use of the way.

To the declaration the appellant pleaded the general issue. A jury trial was had with a verdict in favor of appellee and assessing his damages at the sum of Three Thousand Dollars. Appellant filed a motion for a new trial and the court ordered appellee to remit \$1500.00. Appellee entered a remittitur of \$1500.00 and thereupon the motion for a new trial was over-ruled. Appellant made a motion in arrest of judgment which was denied and judgment was rendered against appellant and in favor of appellee for the sum of \$1500.00, and this appeal followed.

We have examined the record and without expressing any opinion as to the merits of the case, the judgment is reversed and the cause remanded for the reason that the Appellee failed to file a brief and argument, as required by the rules of this court.

Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

Abstract
6902a
AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 663⁵

BE IT REMEMBERED, that afterwards, to-wit: On

OUT 12 1928 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

S. C. COLLINS,

DEFENDANT IN ERROR

vs.

CHICAGO, BURLINGTON &
QUINCY RAILROAD COMPANY,
A CORPORATION

PLAINTIFF IN ERROR

WRIT OF ERROR TO THE CIRCUIT
COURT OF PEORIA COUNTY.

JETT, J.

This proceeding was instituted by S. C. Collins, defendant in error, in the circuit court of Peoria County, against the Chicago, Burlington and Quincy Railroad Company, a corporation plaintiff in error, to recover the value of a truck owned by the defendant in error.

The declaration consists of two counts; the first being a general negligence count, and the second count is one based on the alleged failure of the plaintiff in error to give the statutory signals.

To the declaration, the defendant in error pleaded the general issue. A jury trial was had which resulted in a verdict and judgment in favor of the defendant in error, for the sum of \$3500. The plaintiff in error sued out this writ with a view of reversing the judgment. No complaint is made as to the giving of instructions, or to the amount of the verdict. The reasons assigned for a reversal are (1), that the court should have directed a verdict in favor of the plaintiff in error, and (2) that the court should have granted a new trial because the verdict is against the manifest weight of the evidence.

The evidence shows that S. C. Collins, defendant in error, on September 30, 1926, was engaged in the business of hauling coal in and about the City of Peoria. On the day in question Frank Nichols, one of the employees of the defendant in error, was driving an empty two-and-one-half tone Republic truck in a westerly direction in the Hamlet of Pottstown, in the County of Peoria, near the place where the railroad tracks

S. C. COLLINGS,

DEFENDANT IN ERROR

vs.

CHICAGO, BURLINGTON &
QUINCY RAILROAD COMPANY,
A CORPORATION

PLAINTIFF IN ERROR

JETT, J.

This proceeding was instituted by S. C. Collings,

defendant in error, in the circuit court of Lewis County, against
the Chicago, Burlington and Quincy Railroad Company, a corporation
plaintiff in error, to recover the value of a parcel owned by the
defendant in error.

The declaration consists of two counts; the first
being a general negligence count, and the second count is
based on the alleged failure of the plaintiff in error to give the
statutory signals.

To the declaration, the defendant in error pleaded
the general issue. A jury trial was had which resulted in a
verdict and judgment in favor of the defendant in error, for
the sum of \$3500. The plaintiff in error moved for a new trial
a view of reversing the judgment. He assigned as cause in law
giving of instructions, as to the amount of the verdict. The
reasons assigned for a reversal are (1), that the court should
have directed a verdict in favor of the plaintiff in error, and
(2) that the court should have awarded a new trial because the
verdict is against the medical opinion of the witness.

The evidence shows that S. C. Collings, defendant
in error, on September 20, 1924, was engaged in the business
of hauling coal in and about the City of Nevada. On the day
in question Frank Nichols, one of the employees of the defendant
in error, was driving an eight ton motor truck in the City of Nevada, in
the County of Nevada, near the place where the railroad tracks

of the plaintiff in error and the public highway intersect. At this point the tracks of the plaintiff in error and the tracks of the Chicago & Northwestern Railway Company run parallel about ninety feet apart. At the intersection of the public highway and the tracks of the plaintiff in error, the latter had placed a box car, which at this time was being temporarily used as a telegraph station. This structure was about nine feet wide, nine feet high and something like twenty feet in length, and was standing about ten or fifteen feet from the tracks of plaintiff in error, and close to the public highway. At a point about 265 feet west of the intersection the tracks of plaintiff in error make a decided curve to the north around a hill. Defendant in error contends that along the right of way and on the hill itself there were weeds growing which cut off the view of the tracks to the west from the driver Nichols who was approaching the intersection in question from the north along the public highway.

On the day in question Nichols was driving from Peoria to Pottstown for a load of coal. He testified that after he turned south to cross the above mentioned tracks, he first stopped before crossing the Chicago & Northwestern tracks. He then drove down a slight grade towards the tracks and crossing of plaintiff in error, a distance of approximately 90 feet, during which time he looked for approaching trains on the Chicago, Burlington and Quincy Railroad tracks and finally brought his truck to a complete stop a short distance from the tracks of plaintiff in error. He further testified that while the truck was standing still he looked again for approaching trains; that on the west his vision of the tracks was obstructed by the weeds, hill and box-car; that having neither seen nor heard any train approaching while standing, he put the truck in gear and started to cross the tracks of the plaintiff in error. Immediately upon driving upon the tracks he heard two short blasts of a locomotive to his right, then occurred the collision. He says he knew nothing more until he regained consciousness in the hospital in Peoria.

The evidence shows that the engine struck the truck about the middle as it straddled the tracks and pushed it ahead on the cow catcher for a distance of over 250 feet. None of the witnesses produced by the defendant in error heard any warning of any kind except the distress whistle consisting of several short consecutive blasts which were given only immediately prior to the impact and collision. The evidence shows that this train arrived at this crossing about fifteen or twenty minutes late.

It is the contention of the plaintiff in error that the driver of the truck was not in the exercise of due care for his own safety and the safety of the truck, and that the proper signals were given on approaching the crossing.

It is also insisted that the evidence fails to disclose any negligence on the part of the plaintiff in error in the operation of its train. It will be observed that this action arose out of a highway crossing accident.

Pottstown, where the collision took place is about six miles west of Peoria, and is not an incorporated city or village, and the rules of law as to what is sufficient warning under such conditions, have been laid down and established by the statute of this state, for many years, and reads as follows:--
"Every railroad corporation shall cause a bell of at least thirty pounds weight, or steam whistle to be placed and kept on each locomotive engine, and shall cause same to be rung or whistled by the engineer or fireman, at least eight rods from the place where the railroad crosses or intersects any public highway, and shall be kept ringing or whistling until such highway is reached."
The engine which struck the truck of the defendant in error was equipped with automatic bell, weighing around 135 or 140 pounds, and also with the usual steam whistle. The equipment of the engine complied with the statutory regulations, and if the signals were properly given as required by statute, the plaintiff in error is freed from negligence so far as signals are concerned.

The record discloses that fifteen witnesses testified

The evidence shows that the engine started the train about the
middle of the afternoon and that it was not until about 4:30 p.m.
that the train was started. The evidence also shows that the train
was not started until after 4:30 p.m. and that it was not until
about 5:00 p.m. that the train was started. The evidence also shows
that the train was not started until after 5:00 p.m. and that it
was not until about 5:30 p.m. that the train was started.

It is the contention of the defense that the train was
not started until after 5:00 p.m. and that it was not until
about 5:30 p.m. that the train was started. The evidence also shows
that the train was not started until after 5:00 p.m. and that it
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upon the question of signals, in the trial below; four for the defendant in error and eleven for the plaintiff in error. The witnesses who testified on the part of the defendant in error were Selmin, Salzenstein, Getz and Nichols. Selmin was a passenger on the train, and on examination in chief testified "I was not paying strict attention at all up to the time of the accident. I heard a distress whistle and then a bang. I do not think I heard any bell for a distance of a mile before that crossing. My hearing is good." On cross examination he said "Four of us had been playing cards and had just gotten through. I had not been paying any particular attention to signals. The train might have whistled. I did not hear it and I did not hear any bell. I am not prepared to say the bell was not ringing, because I do not know."

Salzenstein, who also was on the train testified, "The window where I was sitting was open four or six inches. My hearing is good. I heard no whistle blow or bell ringing for a distance of a mile west of the crossing. I do not remember at the time that there was whistle blown, or bell rung. There was nothing to prevent my hearing it if it had been blown." On cross examination he said:- "I say I did not hear the whistle blown. Same thing applies to the bell. I have traveled a good many thousand miles on rails. I do not say that I always hear the whistle."

Getz, who was not a passenger on the train, was standing in his yard southeast of the crossing where the accident happened and about 500 feet distance therefrom. He testified:- "My attention was first directed by the distress whistle of the 'Q' engine. I heard the crash of the collision. The distress whistle was immediately before the crash. I did not hear any whistle but I think the bell was ringing. The bell was ringing at the time of the distress whistle."

Nichols, the truck driver, testified:- "I heard no whistle or bell rung before they hit me. I saw no train at any time before they hit me." It appears that Nichols was injured in the accident and was taken to the Methodist Hospital in Peoria. On the 17th of February, 1927, he settled his claim with the

railroad company and received \$200.00, and at that time he made a statement in writing as to how the accident happened. He made this statement, "I looked west for a train just as I was driving over the C. & N. W. Tracks, and did not look any more for a train until I stopped my truck directly behind the car body, and of course the car body shut off my view, so I could not see the train." He made this further statement, "I cannot say positively whether or not any other whistle was sounded for this crossing, there may have been and I didn't notice them. I cannot say positively whether or not the bell on the engine was ringing."

It will be seen that the testimony on the part of the defendant in error, as to the giving of signals, was merely negative. The record discloses that the ten witnesses testifying on the part of plaintiff in error, to the sounding of the whistle; five of them are company employees. The other five have no interest in this proceeding, and with the exception of the witness, Mrs. Smith, who lives along the track, were passengers on the train.

The record shows that five witnesses, unconnected with the plaintiff in error testified that they heard the giving of the various signals, which the trainmen swear were given. In *Morgan vs. New York Central Railroad Company*, 327 Illinois, 339-343, the court among other things said:- "Testimony negative in its character does not tend to raise an issue of fact, as to whether a whistle was blown or not, when the evidence that the whistle was sounded is positive." The evidence of the four witnesses of the defendant in error, who failed to hear the whistle and bell, does not, in the words of the decision above given, "tend to raise an issue of fact as to whether the whistle was blown or not." We are of the opinion therefore, that the weight of the evidence bearing on the question of signals, shows that the signals were given to notify persons on the highway, of the approach of the train, and that as soon as defendant in error's truck was seen, special warning was made for the particular benefit of the driver.

The notice he received from the giving of the signals apprised him of the approach of the train, and it was his duty to wait for it to pass, and this is true without regard to the curve of the railroad or speed of the train. It is presumed that if the signals were given, as provided by statute, that they were heard by the driver of the defendant in error, and it was his duty to heed them; if he failed to take notice of the signals, he was guilty of contributory negligence, and cannot recover.

In view of the state of the record, we are of the opinion that the judgment of the circuit court of Peoria County should be reversed and the cause remanded, which is accordingly done.

Reversed and remanded.

The notice he contained from the division of the signals
expressed him of the apprehension of the train, and it was his duty
to wait for it to pass, and then to pass it without stopping in the
curve of the railroad or ahead of the train. It is understood
that if the signals were given, as provided for, that they
were heard by the driver of the locomotive in error, and it was
his duty to read them; if he failed to read notice of the signals,
he was guilty of contributory negligence, and almost certain.
In view of the state of the road, we are of the
opinion that the judgment of the circuit court of civil damages
should be reversed and the award remanded, with an award of
costs.

Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

Adell + Co

6703
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 664'

BE IT REMEMBERED, that afterwards, to-wit: On
the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

MAGGIE FEY OFF, et al.,
Appellees

-vs-

EXPOSITION COASTER, INC., et al.,
Appellants.

APPEAL FROM THE CIRCUIT
COURT OF PEORIA COUNTY.

JETT, J.

Appellees, Maggie Fey Off, Charles D. Off, Walter Off, Clifford Off and Clarence Off, individually and as trustees, etc.; Harry J. Schmoeger and George B. Rookwood, filed a bill in the Circuit Court of Peoria County, setting forth that one Charles J. Off died testate some years prior thereto, leaving seventeen acres of land specifically described in said bill, which was devised to appellee Maggie Fey off, widow of said testator, for her lifetime, with remainder to appellees Charles D. Off, Walter Off, Clifford Off and Clarence Off, all of whom were made trustees of said real estate; that appellee Schmoeger was the owner of some 2 $\frac{1}{2}$ acres, and appellee Rookwood was the owner of a small tract of land, all located near and adjoining a tract of land "in excess of eighty acres" owned by appellant, the Greater Peoria Exposition; that appellant Greater Peoria Exposition, on August 1, 1926, leased to appellants John A. Miller and Scott C. Diller a certain part of said premises, rectangular in form, extending approximately 650 feet north and south and 300 feet east and west, adjoining on the west said above-mentioned Off property, and fronting south on Reservoir Boulevard, which extends east and west; that said leasing was for the purpose of conducting an amusement park on said premises; that, before said park was opened, Miller and Diller organized two corporations, one known as the Exposition Coaster, Inc., and the other as the Exposition Amusement Shelter.

Said bill further alleges that, thereafter, there was

WILLIAM W. WILSON, et al.,
Appellants

-VS-

ELIZABETH COOPER, INC., et al.,
Appellees

1937, 1.

Appellants, William W. Wilson, et al., appellees, Elizabeth Cooper, Inc., et al.,
Clifford G. and Clarence G. Wilson, et al., appellees, et al.,
Henry J. Schmecker and George E. Schmecker, et al., appellees, et al.,
Court of Appeals, et al., appellees, et al.,
estate some years prior thereto, leaving no record of land
specifically located in said city, which was revised by appellees
Elizabeth G. G. Wilson, et al., appellees, et al.,
maintain to appellees Charles D. G. Wilson, et al., appellees, et al.,
Clarence G. G. Wilson, et al., appellees, et al.,
that appellee Schmecker was the owner of said city, and appellees
Rockwood was the owner of a small tract of land, all located near
and adjoining a tract of land "in excess of eight acres" owned by
appellee, the Greater Texas Exposition, that appellee Schmecker
Texas Exposition, on August 1, 1935, located to appellee John A.
Miller and Scott E. Miller a certain part of said tract, according
lar in form, extending approximately five feet north and south and
300 feet east and west, adjoining a lot west side of said tract
G. property, and fronting north on Highway B. However, which ex-
tends east and west; that said tract was for the purpose of estab-
lishing an amusement park on said tract; that, before said park was
opened, Miller and Miller organized the corporation, and known as
the Exposition Coaster, Inc., and the latter is the corporation
amusement theater.
This will further appear from the exhibits, there was

erected on said premises a device known as a roller coaster, with carriages with a seating capacity of ten or twelve persons, drawn by machinery to the highest point on said device, from which point they travel by their own momentum up and down over said track, traveling about 1,200 feet in the space of about one minute, etc. That there was also constructed a device consisting of a metal floor about 75 feet square, upon which are operated some thirty electric-driven motors; that said motors, when in operation, bump into and collide with each other; that another device, known as topsy-turvy house, was erected; with floors built at an angle, etc, etc.; that there was also operated on said premises a large dance hall, permitting several hundred couples to dance at the same time, an orchestra furnishing the music therefor.

The bill also alleges "that said amusement park and all of said devices are now in operation and have been so for several weeks; that part of the time said amusement park is open to the public all day long, as well as in the evenings, that the park is operated every evening until midnight;" that said amusement park is a quarter of a mile from the city limits of Peoria, and is reached by an electric street-car line from said city to an entrance on Reservoir Boulevard; that access is also had to said park by automobiles from Knoxville avenue, which runs north and south along the west side of the Off and Schmoeger properties.

The bill further alleges that the Off property is landscaped, and that the said seventeen acres of land is worth \$17,000; that the residence of appellee Maggie Fey Off is worth \$30,000 and the residence of Clarence Off is worth \$15,000; that the Maggie Fey Off residence is 300 feet and the Clarence Off residence is 250 feet from said amusement park, and that both overlook said park and devices. It is further alleged that the Schmoeger property is worth \$15,000 and the Rookwood property is worth \$20,000, and that said Schmoeger and Rookwood properties are 500 feet distant from said park.

Said bill further alleges "that all the noises and confusions of said devices, as well as the music from the orchestra,

erected in said grounds a device known as a Yellin counter, this
apparatus with a rotating assembly of two or three pointers, known
by reference to the highest value on said device, that said pointer
they travel by their own momentum up and down over said scale,
measured about 1,200 feet in the space of about one minute, etc.
That there was also constructed a device consisting of a wheel
that about 75 feet square, upon which was mounted some thirty
electrically-driven motors; that said motors, when in operation, moved
into and collide with said other; that another device, known as
teleg-graphy device, was erected; with fifteen miles of wire,
etc., etc.; that there was also erected on said grounds a large
bamboo wall, approximately several hundred feet in length and
some time, an orchestra furnished for music making.
The bill also alleges that said defendant had the aid
of said devices and was in operation and was found on the ground
within that part of the film said defendant was in with the
public all the time, as well as in the grounds, that the
is operated every evening until midnight; that said defendant
has in a garden of a size that the city limits of London,
and is reached by an electric street-car line from said city to
an entrance on Newbury Street; that there is also said to
said part by a telegraph line from London to London, which said
and which along the west side of the city and surrounding properties.
The bill further alleges that the said property is land-
scaped, and that the said defendant when at said is under
17,000; that the residence of said defendant is 17 in value
200,000 and the residence of said defendant is 17,000; that
the said 17,000 residence is 200 feet and the defendant 17
residence is 17 feet long and defendant 17,000; that said
overlook said part and defendant. It is further alleged that the
defendant property is worth 17,000 and the defendant property
is worth 17,000, and that said defendant and defendant property
and 200 feet distant from said part.

can be plainly heard by all of the occupants of the several residences above described during the daytime and until the park is closed and that said noises interfere with ordinary conversations in said residences and interfere with the health and happiness of the occupants and constitute an unreasonable nuisance to the occupants of said residences." That the operation of said amusement park constituted a nuisance, and that its operation should be enjoined.

Answers were filed to said bill, setting forth among other things that on March 26, 1912, the said Charles J. Off and appellee Maggie Fey Off, by warranty deed conveyed the above-mentioned premises on which said park is located, with other lands, to the National Implement and Vehicle Show, a corporation, of Peoria; that the purpose for which said corporation was organized was for the establishment, owning and operating for pleasure and profit, of fairs, shows and expositions of every kind, at Peoria, Illinois, and elsewhere. Said answer also alleges that, prior to obtaining title to said premises by the said Charles J. Off, seventy acres of said premises were, by the Peoria Agricultural and Trotting Society, used for the purpose of developing the speed of horses and other animals, and for holding race meetings, etc.

Without going further into the answer, it, by specific allegations sets forth that the premises in question had been used for the operation of fairs, the training of horses and exhibiting of live stock, etc., and that the said Charles J. Off was cognizant of that fact and was prominent and took an active part himself in connection therewith. Said answer specifically denies that said amusement park, as operated is a nuisance, or that it would be offensive or disquieting to the ordinary person.

The cause was referred to the master to take the evidence and to report the same, together with his conclusions of law and fact thereon. The master found in favor of appellees, and that an injunction should be granted. The court approved the report of the master, and entered a decree enjoining the operation of said amusement park, as it was then being operated. To reverse

said decree, this appeal is prosecuted.

It is first contended that the evidence wholly fails to support said decree. In this connection, appellants insist that the operation of said amusement park as disclosed by the evidence is not a nuisance per se, and that the evidence with reference to whether or not it is a nuisance in fact is, to say the least, sharply conflicting; that, that being the state of the record, the court should not have granted an injunction until there had been a finding by jury that said park as operated was a nuisance.

In discussing when and under what circumstances courts of equity will grant injunctions to restrain a nuisance, the Supreme Court in City of Pana v. Washed Coal Co., 260 Ill., 111 at page 122, says:

"Courts of equity have power to give relief, whether against public or private nuisances, by compelling their abatement or restraining the continuance of their existence. This jurisdiction was not an original one and is of comparatively recent origin. The general rule is that it is exercised sparingly, with caution, and only in extreme cases,--at least until after the right and the question of the nuisance have first been settled at law. (29 Cyc. 1219, and cases cited.) 'To be entitled to an injunction against a nuisance the plaintiff must present a case of pressing necessity and of injury for which there is no adequate legal remedy.' (2 Joyce on Injunctions, sec. 1044; 2 Beach on Injunctions, sec. 1044.) 'In all cases of this sort, courts of equity will grant an injunction to restrain a public nuisance only in cases where the fact is clearly made out upon determinate and satisfactory evidence, for if the evidence be conflicting and the injury to the public doubtful, that, alone, will constitute a ground for withholding this extraordinary interposition. * * * The same doctrine is equally applicable to cases of private nuisance.' (2 Story's Eq. Jur.--13th ed.--sec. 924a; and see to the same effect, 2 Joyce on Injunctions, secs. 1064, 1065; 2 Wood on Nuisances,--3d ed.--sec. 786; 1

High on Injunctions,--3d ed.--sec. 740.) The equitable doctrines applicable to public nuisances are essentially the same as those that apply to private nuisances. * * *

"If there is a substantial dispute as to the fact or law and the question is in doubt, a trial at law will be required before equity will intervene. (1 Pomeroy's Eq. Rem. sec. 542; see, also, Gould on Waters,--3d ed.--sec. 507.) When, however, the existence of a nuisance has been established at law, a court of equity will grant an injunction as a matter of course. (2 Joyce on Injunctions, sec. 1064; 2 Beach on Injunctions, sec. 1064; 1 High on Injunctions,--3d ed.--sec. 741.) 'Where the facts are easy of ascertainment and the rights resulting therefrom free from difficulty, equity will grant relief either at the suit of the public or of the citizen.' (Green v. Oakes, 17 Ill. 249.) 'A court of equity will, under some circumstances, grant an injunction to restrain the erection of a nuisance, but with great caution. This is always so where there is a remedy at law, until the right has been established by a verdict; and a court will always act with reluctance in abating a nuisance, and seldom, if ever, until it has been regularly found to be such by a jury.' (Dunning v. City of Aurora, 40 Ill. 481; see to the same effect, Town of Lake View v. Letz, 44 Ill. 81; Thornton v. Roll, 118 id. 350; Nelson v. Milligan, 151 id. 462.) Wherever the legal right is clearly established and the unreasonable and unlawful use of property to the injury of others is clearly proved, it is not necessary that the question should be first determined in a suit at law. (Wente v. Commonwealth Fuel Co. 232 Ill. 526; Oehler v. Levy, 234 id. 595.) * * * The general rule formerly strictly enforced was, that a court of equity would not interfere to restrain a nuisance unless the right so to do was first established in a court of law; but this rule has been somewhat relaxed in modern times, and when the case is clear, so as to be free from substantial doubt as to the right to relief, or it is evident that a nuisance per se exists, equitable relief may be granted without first resorting to an action at law. (Village of Dwight v. Hayes,

High on injunction,--33 of. 100. The principle is that
applicable to public relations and especially the same as those
that apply to private relations. 33 of. 100.

It is a well-known principle that the law is the
and the question is in fact, a trial of law will be required before
equity will intervene. (1) In equity, the law is the law, and
Gould on Equity,--33 of. 100. (2) In equity, the law is the law, and
of a nuisance has been established by law, a court of equity will
grant an injunction as a matter of course. (3) In equity, the law is the law, and
sec. 100; 2. In equity, the law is the law, and
33 of. 100. (4) In equity, the law is the law, and
the rights resulting therefrom from the law, equity will grant
relief either at the suit of the public or of the individual. In equity,
v. Oakes, 17 Ill. 249. (5) A court of equity will, under the
circumstances, grant an injunction to restrain the commission of a
nuisance, but with great caution. This is clear in equity, and
is a remedy at law, until the right has been established by law,
and a court will always act with reluctance in granting a remedy,
and relief, if ever, until it has been established by law to be such
by a jury. (6) In equity, the law is the law, and
same effect, Tow of Paris v. New York, 101 Ill. 241; Chicago v.
Hall, 118 Ill. 230; Chicago v. Miller, 101 Ill. 241. (7) In equity, the law is the law, and
legal right is clearly established and the remedy is at law, and
use of property, to the injury of others is clearly stated, and is
not necessary that the person should be directly injured in a suit
at law. (8) In equity, the law is the law, and
100, 244 Ill. 238. (9) In equity, the law is the law, and
enforced was, that a court of equity would not interfere in a
a nuisance unless the right to do so was first established by a
court of law; and this rule has been consistently followed in equity
times, and when the case is clear, as in the case of a nuisance,
found as to the right to relief, or in the case of a nuisance,
nuisance, or as a nuisance, or as a nuisance, or as a nuisance,
first resulting in an action at law. (10) In equity, the law is the law, and

150 Ill. 273; 1 High on Injunctions,--3d ed.--sec. 748; 2 Joyce on Injunctions, sec. 1064; 29 Cyc. 1230.)"

In Sutton v. Findlay Cemetery Assn., 270 Ill. 11, the Supreme Court at page 19 says:

"In McCutcheon v. Blanton, 59 Miss. 116, it was said every doubt should be solved against the restraint of a proprietor in the use of his own property for a purpose seemingly lawful and conducive both to individual gain and the general welfare. Relief by injunction is so severe in its consequences that it is not to be granted in such a case except when the right to it is clearly and conclusively made out. To interfere with one's right to use his own land for the production of what he pleases, in a case of doubt, would be a flagrant abuse of power. It is not enough to show a probable or contingent injury, but it must be shown to be inevitable and undoubted."

Eighteen witnesses, including the appellees, testified in their behalf. Seventeen of these witnesses testified in effect that the noise from the roller coaster and the other mechanical amusement devices, the noise from the dance hall, the operation of the automobiles going to and from said park, were such that it disturbed the peace and quiet of residents on the above-mentioned premises; that they could not carry on an ordinary conversation, and that it was hard for them to go to sleep until after said amusement park closed.

On the other hand, certain of the officers of appellant Greater Peoria Exposition, and other of the appellants, with certain other witnesses, business and professional men, some thirty in all, testified that they had made tests at times when said amusement park was in full operation, at different points, including places near the respective residences of appellees, and found that they could carry on the ordinary conversation without any difficulty; that the noise from the roller coaster, which is complained of most seriously, was not of a character to disturb conversations or to be disquieting to the ordinary person.

[illegible]

In Witness Whereof, I have hereunto set my hand and the seal of the said Court, at the City of New York, this 11th day of May, 1968.

There is a lot of money

"In testimony v. Plaintiff, do not, if you can, do not."

"Detached"

Eighteen witnesses, including the defendant, testified that the defendant was not present at the scene of the shooting.

was hard for them to go to sleep until after midnight, and that it
the peace and quiet of residence in the above-mentioned houses;
automobiles going to and from said parts, were such that it disturbed
ment houses, the noise from the same being, the equivalent of the
that the noise from the roller coaster was the same as the noise from
in their behalf. Nevertheless of those who were not in the habit of

On the other hand, certain of the witnesses at Springfield
greater fourth expedition, and that of the expedition, with certain
other witnesses, business and professional work, some of which is all
testified that they had said that at least one of the witnesses had
was in this operation, as different points, including those who had
respective witnesses at Springfield, and those who had been with
the military government with respect to the expedition, and the other
the other position, which is contained in each of the other
a statement to the effect that the witnesses at Springfield had been
the other witnesses.

George F. Fey, a brother of Maggie Fey Off, testified on behalf of appellees: "I visit my sister quite often--once or twice a week--both in the daytime and at night. I am familiar with the amusement park that adjoins the Off property immediately on the east. I have been on the Off property when I heard sounds emanating from the amusement park. There is a great deal of laughter going on when they are on the roller coaster and the coaster itself makes an awful noise like the starting and stopping of railroad trains. It might be compared to an elevated railroad. The shooting gallery makes some noise. The dodgem makes a low rumbling noise only when in operation. I heard the orchestra. The noise is only when they are in operation. I have slept on the north side of the house, in other words, the front rooms. We seldom go to sleep until the amusement is stopped. The noise never bothered me in my conversation with my sister in the house, or was it interfered with by reason of the noise emanating from the park. Well, as I say, it never bothered me. You could hear it, but it never bothered me. Trifles like that don't bother me."

L. A. Miller and Maggie Miller, husband and wife, testified that they lived next door to appellee Schmoeger, and that they were not disturbed by the noises from the park. Mrs. Miller testified: "When the wind is right in the northeast, we can hear noises coming from the amusement park. We go to bed from 9 until 11. I never heard enough noise to pay any attention to it. I never heard the noise in the house. It never keeps me awake." L. A. Miller testified: "When the wind is right, the noise I hear on the roller coaster is comparable with the noise I hear from an automobile on the Knoxville road as it goes by my house, some 50 feet from the road."

Said bill does not allege, nor does the testimony disclose any damage to the market or rental value of the premises in question, owned by appellees. Appellee Charles Off resides three miles and Walter Off resides two miles from said park, while Clifford Off resides in the city of Chicago. So far as these three complainants are concerned, the proof fails to show that their rights have in any way been invaded.

The first of these is the fact that the noise is not a continuous one, but is intermittent. It is a series of short, sharp, rattling sounds, which are repeated at intervals of a few seconds. The noise is not a continuous one, but is intermittent. It is a series of short, sharp, rattling sounds, which are repeated at intervals of a few seconds. The noise is not a continuous one, but is intermittent. It is a series of short, sharp, rattling sounds, which are repeated at intervals of a few seconds.

been invaded.

One of the grounds urged by appellees as to why the decree of the circuit court should be affirmed is that the territory in which the land owned by the complainants is located, is a residential territory. Numerous photographs were admitted in evidence, with proof of their accuracy, which disclose that this territory is not a closely built up territory, and that there are but few residences in that vicinity, other than those owned by appellees, and that the territory beyond is open country. There is no merit in this contention.

Counsel for appellees cite and rely on Phelps, et al, v. Winch, et al, 309 Ill. 158. In that case the Supreme Court reversed the decree of the trial court dismissing a bill brought to restrain the operation of a dance hall, etc., at a summer resort. At page 161 the court said:

"There was some conflict in the testimony of the respective parties, but we think it clearly preponderates in favor of complainant and fully justified the master's finding of the facts. The master, after describing the use made of the pavilion and its proximity to complainant's premises, found as facts that the rolling of balls on the box ball alleys, the music which was suited to dances of the present period, laughter, applause, making announcement, shuffling of feet, and noise and confusion when the dance breaks up," etc., "can be distinctly heard in complainants' houses, * * * and that the noises interfere with the ordinary conversations in complainants' houses and disturb them in their use, prevent rest and sleep, and make their homes much less desirable."

The facts set forth in that case, we think, are substantially different from the facts disclosed by this record. In the Phelps case, the place where the dance hall was conducted was primarily a summer resort, occupied by cottagers. The court there held that the clear preponderance of the evidence supported the allegations of the bill. We are not able to say that the clear preponderance of the evidence here supports the allegations of appellees. That being the state of the record, it will not be necessary for us to discuss the other questions raised. We are not holding that the operation of said amusement park is or is not a nuisance.

• Delayed need

One of the problems of the world is the fact that the world is not a homogeneous whole. It is a collection of many different peoples, each with its own customs, habits, and ways of life. The world is a mosaic of many different cultures, each with its own unique character and identity. The world is a complex and diverse place, and it is our duty to understand and respect the differences between the various peoples of the world.

the location of a dance hall, etc., at a small resort. It was
the house of the first owner of the property. The house was
burned, by fire, in 1911. It was then owned by the same
owner, by the name of the house, etc., at a small resort.

[illegible][illegible][illegible]

operation of said amusement park is or is not a nuisance. We are not passing on the weight of the evidence, further than to say that it is not of that conclusive character which would warrant a court of equity in granting relief by injunction, before it has been determined in an action at law that the master complained of is in fact a nuisance.

The decree is therefore reversed, and the cause remanded, with directions to dismiss said bill.

Reversed and remanded, with directions.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 664²

BE IT REMEMBERED, that afterwards, to-wit: On
the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



In The
APPELLATE COURT OF ILLINOIS,
Second District.
OCTOBER TERM, A. D. 1928

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| | | |
|---|-----------------------|--|
| THE PEOPLE OF THE STATE OF ILLINOIS,)
Defendant in Error,)

-vs-)

EDITH ORTELL,)
Plaintiff in Error.) | {
{
{
{
{ | Error to the
Rock Island County
County Court |
|---|-----------------------|--|

OPINION by BOGGS, J.

An information consisting of two counts was filed by the state's attorney in the county court of Rock Island County against plaintiff in error. The first count charged unlawful possession of intoxicating liquor, with intent to use the same in violation of the prohibition act, etc. The second count charged the unlawful sale of intoxicating liquor. A plea of not guilty was entered by plaintiff in error, and a trial was had. At the conclusion of the trial, the second count of the information was nolled by the state's attorney, and a verdict was returned finding plaintiff in error guilty, on which verdict the court rendered judgment. Plaintiff in error was fined \$1,000.00 and costs of suit, and an order was entered that she stand committed until said fine and costs were paid. To reverse said judgment, this

writ of error is prosecuted.

Plaintiff in error lived with her husband in an apartment located on Second Avenue in the city of Rock Island. On December 3rd, 1926, the sheriff and certain police officers, clothed with a search warrant, entered said apartment, where they found and took possession of a considerable quantity of intoxicating liquors. Plaintiff in error was at home at the time said raid was made and said liquors were found. Certain of said officers testified that plaintiff in error stated; "I keep that (said liquors) for my own use. I have drank since I was a little girl, and expect to drink as long as I live."

Plaintiff in error testified that a Mr. Timmons, a Mr. Baum, a Mr. Stewart and a Mr. Smith occupied rooms in said apartment; that on December 3rd, 1926, she, plaintiff in error, "was sitting in the living room, sewing. Mr. Stewart, one of the roomers, came into the kitchen from the back door and said to me that he was going to leave a package in the kitchen, and then went to his room." On cross examination, she testified: "I didn't see Stewart when he asked me if he could leave a package in the kitchen. He hollered to me, but I knew his voice."

Timmons testified: "Mr. Stewart occupied the room next to mine. Mr. Stewart came in a little after five P. M. on the day of the raid. I knew that Stewart owned and possessed intoxicating liquor taken from the premises that day. He vacated his room that day and I have not seen him since."

The foregoing is substantially the evidence touching plaintiff in error's connection with said liquors. Plaintiff in error sought to develop by cross examination that said liquors, which were being offered in evidence in this case, were offered on the trial of her husband, which had taken place about a week prior, and that he was convicted of the unlawful possession of

the same liquors, as tending to show that the possession of said liquors was not in plaintiff in error, but in her husband.

If the husband was tried and convicted on a charge of the unlawful possession of the same liquors, it would seem to follow that the wife could not be convicted therefor, unless the proof disclosed some joint business relation with reference to said liquors. In People v. Paule, 223 App. 613, this court, in discussing a similar question, at page 615 says:

"The ~~contention~~^{error} of defendant in error is that she (plaintiff in error) is guilty as an accessory and for the further reason that she was present when the law was violated and did not disapprove or oppose such violation.

"Grace Marie Paule as the wife of Joseph Paule occupied this house; that was her home. She not only had a right to be there but it was her duty to be there. Her mere presence in the house was, alone and of itself, no evidence of guilt. Nor was the fact that her husband, in her presence, sold intoxicating liquors sufficient to justify her conviction. The husband was the head of the household and was supposed to dominate its affairs. She was not guilty of maintaining a nuisance unless she did some affirmative act which showed that she was one of the parties to the act. The evidence is not sufficient to show such affirmative act, is not sufficient to sustain a conviction as to her and the judgment will be reversed as far as she is concerned."

The court therefore erred in its rulings on the evidence.

It is next contended by plaintiff in error that the court erred in refusing to give the eight refused instructions, offered by plaintiff in error on the trial of said cause, but no reasons were pointed out in support of this contention. It is not the duty of this court to search the record for reasons for holding the rulings of a trial court erroneous. However,

the fifth refused instruction is as follows:

"The jury are further instructed that if you believe from all of the evidence beyond a reasonable doubt that the defendant, Edith Ortell, did not bring said intoxicating liquor into her place of business, or into her home, and did not possess same and had no interest in its ownership, then you cannot find the defendant, Edith Ortell, guilty of the possession of intoxicating liquor."

From the investigation we have made, we are of the opinion that this instruction should have been given, as it states a correct principle of law, which was not covered by the given instructions.

For the reasons above set forth, the judgment of the trial court will be reversed, and the cause will be remanded.

Reversed and Remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

Call me

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-eight, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 664³

BE IT REMEMBERED, that afterwards, to-wit: On

1928 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

In The
APPELLATE COURT OF ILLINOIS,
Second District.
OCTOBER TERM, A. D. 1928

| | |
|--|----------------|
| THE PEOPLE OF THE STATE OF ILLINOIS,) | |
| Defendant in Error,) | Error to the |
| -vs-) | |
| BEN WILLARD,) | McHenry County |
| Plaintiff in Error.) | County Court |

OPINION by BOGGS, J.

On April 23rd, 1928, plaintiff in error was arrested, on an information consisting of two counts, filed by the state's attorney of McHenry County on that date. The first count of said information charged the unlawful possession of intoxicating liquor, and the second count charged an unlawful sale. To said information plaintiff in error entered a plea of not guilty, and, a trial was had, resulting in a verdict of guilty on both counts. The motion for a new trial being overruled, plaintiff in error was fined \$500.00 and costs, and sentenced to the State Farm at Vandalia for six months, on each count, with a provision that he stand committed until said fine and costs were fully paid or worked out at the rate of \$1.50 per day. To reverse said judgment, this writ of error is prosecuted.

It is first contended that the court erred in refusing to continue said cause for the purpose of giving plaintiff in er-

In The
APPELLATE COURT OF ILLINOIS,
Second District.
OCTOBER TERM, A. D. 1928

| | |
|--|----------------|
| THE PEOPLE OF THE STATE OF ILLINOIS,) | |
| Defendant in Error,) | Error to the |
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OPINION by BOGGS, J.

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It is first contended that the court erred in refusing to continue said cause for the purpose of giving plaintiff in er-

ror a reasonable time in which to prepare for trial.

The record discloses that plaintiff in error was arrested on the day said information was filed; that he was immediately incarcerated in jail and did not procure his release on bond until the following day, about 10:30; that, about 11 o'clock of that day, the judge of said court and the sheriff of said county both phoned plaintiff in error's counsel, Mr. Palmer, who resided at Harvard, some twelve miles distant, and advised him that the case was set for trial at 2 o'clock of that day. At the time appointed, plaintiff in error's attorney made a motion for a continuance. The court denied the motion, stating:

"Mr. Palmer, I would grant a continuance if there was anything complicated about the case, if it had more than one angle, but this case is more simple than most cases that I have tried in the justice court. I will inform you of the whole case in advance. This man sitting here in the court room (referring to the complaining witness) is going to take the stand and testify that he bought a bottle of intoxicating liquor in Harvard and paid the defendant \$3.00 for it. That is all the evidence the State has to offer. Now, it does not seem to me that any lawyer needs much preparation on that state of facts."

Where it appears from the record that a defendant has been prejudiced by the refusal of the trial court to afford him a reasonable opportunity to prepare for trial, his conviction will be set aside. Certainly it was an abuse of discretion for the court to force plaintiff in error to immediate trial, under the circumstances shown by the record. Conley v. People, 80 Ill. 236-238; Goodhue v. People, 94 Ill. 37-53; North v. People, 139 Ill. 81, 98-99; City of Chicago v. Geraghty, 189 App. 90-91.

It is next contended that the conduct of the state's attorney during the trial amounted to reversible error. At the completion of the evidence, counsel for plaintiff in error, by leave of court, withdraw for a few moments to confer with his

not a reasonable time in which to prepare the brief.

The court discussed this question fully in its opinion.

As the law was interpreted, the court held that the defendant was not entitled to a continuance of the trial.

The following are the facts of the case: The defendant was charged with the murder of a woman.

At the trial, the defendant was represented by counsel. The court found that the defendant was not competent to stand trial.

The court held that the defendant was entitled to a continuance of the trial until such time as he was competent to stand trial.

The court granted the motion for a continuance.

"Mr. Justice, I would like to submit a motion for a continuance of the trial.

My client is unable to stand trial at this time. He is suffering from a mental illness.

My client has been examined by a doctor, who has advised me that he is not competent to stand trial.

I am asking the court to grant a continuance of the trial until such time as my client is competent to stand trial.

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The court held that the defendant was entitled to a continuance of the trial until such time as he was competent to stand trial.

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The court granted the motion for a continuance.

versible error.

It is next contended that the evidence was not sufficient on which to base a verdict finding the defendant guilty of a sale and also of the unlawful possession of intoxicating liquor; that while the evidence, if the jury believed it, was sufficient to sustain a finding of guilty on the charge of an unlawful sale, it was not sufficient on which to base a conviction of unlawful possession.

Beyond question, if plaintiff in error had been tried alone on the count charging unlawful possession, said evidence would have been sufficient upon which to base a verdict of guilty. It disclosed the possession of intoxicating liquor with the unlawful intent to sell the same, which constitutes an offense under section 3 of the prohibition act. The mere fact that this evidence, if true, also disclosed an unlawful sale, in violation of said act, would not operate to make said evidence inadmissible on the charge of unlawful possession, it being the same transaction. Goodhue v. People, supra, 51; Herman v. People, 131 Ill. 594-602, 603; Herman v. People, 117 Ill. 195-200; People v. Warfield, 261 Ill. 293-298.

The question whether or not the evidence supports a certain count or counts of an indictment or information is to be determined as to each particular count, without reference to whether or not the same evidence supports any other count. It therefore follows that said assignment of error is not well taken.

It is next contended that the court had no warrant for imposing a sentence to the State Penal Farm at Vandalia, and also imposing a fine to be worked out at said Farm at the rate of \$1.50 per day in the event said fine and costs were not paid, under the count charging unlawful possession.

Section 33B of the Illinois Prohibition Act (Sec. 34,

chap. 43, Cahill's Stat.) Provides:

"Any person violating the provisions of any permit, or who *****violates any of the provisions of this Act, for which offense a special penalty is not prescribed, shall be fined for a first offense not less than \$100.00 nor more than \$1,000.00, or be imprisoned not less than sixty days, nor more than six months," etc.

Sections 5 and 28 of said Act provide what shall be an unlawful possession of intoxicating liquor, but provide no penalty therefor. It would therefore follow that, on a conviction for unlawful possession, a fine of \$1000.00 may be imposed, or imprisonment of sixty days to six months, but both fine and imprisonment cannot be imposed. People v. Martin, 245 App. 282-285; People v. Martin, 314 Ill. 110-112. While the Search and Seizure Act provided for both fine and imprisonment for unlawful possession, it has been held that the Prohibition Act repeals, at least by implication, all provisions of the former act in conflict therewith. People v. Williams, 309 Ill. 492-495; People v. Billerbeck, 323 Ill. 48-52.

It is also contended that there is no authority of law for imposing a fine to be worked out at the State Penal Farm; that a sentence of this character is only warranted "in the county where the conviction is had."

An examination of sections 1 and 4 of the act in relation to the Illinois State Farm (par 248 and 251, chap. 23, Cahill's Stat.), as construed in People v. Lavendowski, 329 Ill. 223-233, discloses that this point is not well taken, and that a judgment of this character is warranted where the record otherwise sustains the same.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

1941-1942, 1943-1944, 1945-1946, 1947-1948, 1949-1950

10. *Plants can be manipulated with sufficient accuracy that*

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It is not clear why the 1994 study was not the best benchmark of the

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10-11-68

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

— 1129 —

1. *Journal of the American Medical Association*, 1977; 237: 1000-1001.

1990 and 91 (1990/91) and 1991 and 92 (1991/92) are shown in Table 1.

NUMBER OF DAYS SINCE THE LAST RECEIPT OF THE PAY

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

250 I.A. 664⁴
Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:



In The
APPELLATE COURT OF ILLINOIS
Second District

May Term, A. D., 1928.

ELIZABETH YUODVIRSIS,)
Defendant-in-Error,)
vs.)
PETER ANTONOVICH,)
Plaintiff-in-Error,)

Error to the City Court
of the City of Kewanee, Henry
County, Illinois

OPINION by BOGGS, J.

Defendant in error, hereinafter called plaintiff, instituted an action in assumpsit against plaintiff in error, hereinafter called defendant, in the city court of Kewanee, to recover on an alleged loan of \$600.00 to defendant. The declaration consists of the common counts, to which the defendant filed a plea of the general issue and notice of set off. To the notice of set off, plaintiff replied the statute of limitations. A trial was had, resulting in a verdict and judgment in favor of plaintiff for \$600.00. To reverse said judgment, this writ of error is prosecuted.

We would be warranted in affirming this case for the reason that defendant, in abstracting the transcript did not set out said notice of set off or the replication thereto. We have, however, deemed it advisable to consider the case on the merits.

It is first contended that the court erred in its rulings on the evidence.

Plaintiff, a lady 78 years of age, testified that the defendant requested her to loan him \$600.00; that on April 30, 1924, they went to The First National Bank of said city, where she drew from her account

\$600.00, and on their return to her home she delivered said money to the defendant; that she requested of him a receipt or a note of some kind to evidence said loan "but he did not give it to me. He said he would pay me back Christmas, and not to worry about any receipt. He was to pay me \$40.00 a year for the money."

William J. Freeman, teller for said bank, testified that he knew the plaintiff and defendant, and saw them at the bank on the day in question; that plaintiff drew out \$600.00 from her account at that time. He was asked: "What did you say to her (plaintiff)?" He answered: "When I made out the check, I asked her in what form she wanted it in, and she said that she was going to give it to the man that was with her." Counsel for defendant moved to strike said answer, but the court let it stand. This witness further testified that the defendant stood "right next to her (plaintiff) in front of my window." While the statement of the plaintiff was not binding on the defendant, at the same time, it was a circumstance tending to corroborate plaintiff. As the statement was made in the presence of the defendant, the court properly allowed the answer to stand.

It is also contended that the court erred in admitting said check in evidence. It was a part of the transaction, according to plaintiff's theory, and tended to corroborate her, and, as it was drawn and cashed in the presence of the defendant, it was not error to admit the same.

It is also insisted that the court erred in permitting plaintiff to testify that, on another occasion, she had loaned the defendant \$300.00, and he had only repaid \$200.00 thereof, and that he still owed her \$100.00 on the former loan. As the declaration consists of the common counts, it was proper to admit said testimony, unless for the reason that it was not set forth in the bill of particulars, that point however, was not made. Had it been so raised, the trial court would have no doubt permitted plaintiff to amend her said bill of particulars so as to include the same. The only objection made to said testimony was that it was immaterial.

no \$48.00 a year for the money."

answer to stand.

the same.

[illegible]

It is next contended that the court erred in giving plaintiff's ninth instruction. This instruction advised the jury that the defendant could not avail himself of a set off which did not present credits within five years from the date of the commencement of the suit. The court erred in giving this instruction, for the reason that the defendant would have been entitled to credit for all amounts due him from the plaintiff, accruing within five years prior to the time of the making of the loan in question. However, in the state of the record, we would not be warranted in reversing the judgment on that ground.

This suit was instituted on May 24, 1927, and was tried on July 7, 1927. The loan in question, according to the testimony of plaintiff, was made on April 30, 1924. If the plaintiff was entitled to recover, she was entitled to recover for the \$600.00 with interest from April 30, 1924, to the time of the trial at the rate of \$40.00 per year, amounting to some \$126.00, or a total of principal and interest of about \$726.00, less whatever credits the defendant was entitled to under his set off.

While the defendant testified to having sold the plaintiff certain provisions, etc., his testimony in connection therewith is very indefinite. On direct examination, he stated:

"I delivered her ~~2~~ (plaintiff) about four loads of coal. I furnished her hay, three or four tons. I also furnished her cabbage, meat, potatoes, eggs, ducks. I asked her when she was going to pay me for my stuff and she said, 'some time'. I told her she owed me \$240.00, over at her home. The last articles I delivered to her was about two years before this last conversation."

On cross examination, he testified:

"I sold cabbage to Mrs. Yuodvirsis on the 19th day of October, 1918. I do not know the exact days I sold my stuff. I wrote that down and gave it to my lawyer. I sold Mrs. Yuodvirsis milk for two or three years. I couldn't tell the exact months. I ~~used~~ to sell her a pint and a quart at a time. I sold her tomatoes, four or five bushels. I sold her eggs. I sold her duck eggs and chicken eggs." He also testified: "Mrs. Yuodvirsis never paid for anything that I sold her. I took three tons of hay down to her place. I paid the farmer \$25.00 a ton for the

hay and I charged her \$5.00 for hauling it."

This, in substance, is the testimony of the defendant with reference to his set off. There is no proof whatever in the record as to the value or the quantity of said articles, with the exception of the coal and the hay. There is no proof with reference to the time of the delivery of said articles, except as stated in defendant's quoted testimony.

Plaintiff denied the purchase of any tomatoes, chickens or eggs. She stated that she bought a bushel of potatoes and a goose, but paid for them, and that she paid for the milk she got of defendant. She further testified that defendant spent two or three hours helping her move, and moved a chicken house for her; that she was willing to pay him for such work, but that he didn't charge her anything. She also testified that she paid him for the coal that he had delivered to her.

We would not be warranted in reversing said judgment for the error in giving said instruction, for the reason that, even allowing the defendant credit for the goods he claimed to have furnished plaintiff, so far as any proof of the value thereof was made, plaintiff's claim would not be reduced below \$600.00. This too without reference to the \$100.00 which plaintiff testified was due her on a former loan.

Error is also assigned on the giving of plaintiff's fourth and fifth instructions. What we have said with reference to the ninth instruction also applies to the fourth and fifth instructions given on behalf of plaintiff.

Defendant also assigns as error the giving of plaintiff's third instruction, and that the verdict is against the evidence. Neither of these assignments is referred to in the argument of counsel. We are therefore, not required to pass on the same. Duggan v. Ryan, 211 Ill. 133-137, citing Razor v. Razor, 142 Ill. 375; Metropolitan Bank v. Merchants' Bank, 182 Ill. 367; Keyes v. Kimmel, 186 Ill. 109.

It may be observed however that, while the defendant denied the borrowing of said money, some three or four witnesses testified in corroboration of the plaintiff, in effect, that the defendant admitted

may and I charged her to take the money to the
This, is understood, is the testimony of the witnesses who
reference to his cell only. There is no great concern in the matter as
to the value or the quantity of said articles, after the completion of the
cell and the key. There is no great concern in the matter as to the
delivery of said articles, except as stated in defendant's answer to the
money.

Defendant's answer to the questions of her attorneys, submitted in
evidence. She stated that she had a number of articles in her cell, and
paid for them, and that she paid for the cell and the key of defendant. She
further testified that defendant, who had no three dollar bill in her
move, and moved a dollar bill for her; that she was willing to pay him
for such work, but that he might change her opinion. She also testi-
fied that she paid him for the cell and the key and delivered to him.

It would not be surprising if defendant had received the
error in giving said instructions, for the witness had, when asked the
defendant as well as the State as to the bill to have furnished the bill,
so far as any part of the bill passed was concerned, defendant's claim
would not be denied unless \$100.00. This two dollar bill was in the
\$100.00 which defendant testified was the one in a dollar bill.

There is also a bill of \$100.00 of defendant's money
and fifth instructions. But we have said with reference to the state
instruction also applied to the state and fifth instructions given
on behalf of defendant.

Defendant also testified on cross the money of defendant's
third instruction, and that the witness is against the evidence. But
of these instructions is referred to in the argument of counsel. We are
therefore, not required to read on the same. People v. Brown, 112 Ill.

133-137, citing People v. Brown, 112 Ill. 378; People v. Brown, 112 Ill.
378-379; People v. Brown, 112 Ill. 378; People v. Brown, 112 Ill. 378.
It may be observed however that, while the defendant claimed
the purpose of said money, some three or four hundred dollars in
consequence of the defendant, in effect, that the defendant claimed

owing the plaintiff for borrowed money, and that he intended to repay her. The testimony was conflicting, but the verdict is not against the manifest weight of the evidence, and we would not be justified in reversing said judgment for that reason, even if said assignment of error had been argued.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof,
do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above
entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand
nine hundred and twenty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

70212
Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and twenty-eight,
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 664⁵

BE IT REMEMBERED, that afterwards, to-wit: On

1928 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

7970

Agenda No. 47

In The

1992 1993 1994 1995 1996

~~~~~

-VS-

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1999-2000-2001-2002-2003-2004-2005-2006-2007-2008-2009-2010-2011-2012-2013-2014-2015-2016-2017-2018-2019-2020-2021-2022-2023-2024-2025-2026-2027-2028-2029-2030-2031-2032-2033-2034-2035-2036-2037-2038-2039-2040-2041-2042-2043-2044-2045-2046-2047-2048-2049-2050-2051-2052-2053-2054-2055-2056-2057-2058-2059-2060-2061-2062-2063-2064-2065-2066-2067-2068-2069-2070-2071-2072-2073-2074-2075-2076-2077-2078-2079-2080-2081-2082-2083-2084-2085-2086-2087-2088-2089-2090-2091-2092-2093-2094-2095-2096-2097-2098-2099-2100-2101-2102-2103-2104-2105-2106-2107-2108-2109-2110-2111-2112-2113-2114-2115-2116-2117-2118-2119-2120-2121-2122-2123-2124-2125-2126-2127-2128-2129-2130-2131-2132-2133-2134-2135-2136-2137-2138-2139-2140-2141-2142-2143-2144-2145-2146-2147-2148-2149-2150-2151-2152-2153-2154-2155-2156-2157-2158-2159-2160-2161-2162-2163-2164-2165-2166-2167-2168-2169-2170-2171-2172-2173-2174-2175-2176-2177-2178-2179-2180-2181-2182-2183-2184-2185-2186-2187-2188-2189-2190-2191-2192-2193-2194-2195-2196-2197-2198-2199-2200-2201-2202-2203-2204-2205-2206-2207-2208-2209-2210-2211-2212-2213-2214-2215-2216-2217-2218-2219-2220-2221-2222-2223-2224-2225-2226-2227-2228-2229-2230-2231-2232-2233-2234-2235-2236-2237-2238-2239-2240-2241-2242-2243-2244-2245-2246-2247-2248-2249-2250-2251-2252-2253-2254-2255-2256-2257-2258-2259-2260-2261-2262-2263-2264-2265-2266-2267-2268-2269-2270-2271-2272-2273-2274-2275-2276-2277-2278-2279-2280-2281-2282-2283-2284-2285-2286-2287-2288-2289-2290-2291-2292-2293-2294-2295-2296-2297-2298-2299-2300-2301-2302-2303-2304-2305-2306-2307-2308-2309-2310-2311-2312-2313-2314-2315-2316-2317-2318-2319-2320-2321-2322-2323-2324-2325-2326-2327-2328-2329-2330-2331-2332-2333-2334-2335-2336-2337-2338-2339-2340-2341-2342-2343-2344-2345-2346-2347-2348-2349-2350-2351-2352-2353-2354-2355-2356-2357-2358-2359-2360-2361-2362-2363-2364-2365-2366-2367-2368-2369-2370-2371-2372-2373-2374-2375-2376-2377-2378-2379-2380-2381-2382-2383-2384-2385-2386-2387-2388-2389-2390-2391-2392-2393-2394-2395-2396-2397-2398-2399-2400-2401-2402-2403-2404-2405-2406-2407-2408-2409-2410-2411-2412-2413-2414-2415-2416-2417-2418-2419-2420-2421-2422-2423-2424-2425-2426-2427-2428-2429-2430-2431-2432-2433-2434-2435-2436-2437-2438-2439-2440-2441-2442-2443-2444-2445-2446-2447-2448-2449-2450-2451-2452-2453-2454-2455-2456-2457-2458-2459-2460-2461-2462-2463-2464-2465-2466-2467-2468-2469-2470-2471-2472-2473-2474-2475-2476-2477-2478-2479-2480-2481-2482-2483-2484-2485-2486-2487-2488-2489-2490-2491-2492-2493-2494-2495-2496-2497-2498-2499-2500-2501-2502-2503-2504-2505-2506-2507-2508-2509-2510-2511-2512-2513-2514-2515-2516-2517-2518-2519-2520-2521-2522-2523-2524-2525-2526-2527-2528-2529-2530-2531-2532-2533-2534-2535-2536-2537-2538-2539-2540-2541-2542-2543-2544-2545-2546-2547-2548-2549-2550-2551-2552-2553-2554-2555-2556-2557-2558-2559-2560-2561-2562-2563-2564-2565-2566-2567-2568-2569-2570-2571-2572-2573-2574-2575-2576-2577-2578-2579-2580-2581-2582-2583-2584-2585-2586-2587-2588-2589-2590-2591-2592-2593-2594-2595-2596-2597-2598-2599-2600-2601-2602-2603-2604-2605-2606-2607-2608-2609-2610-2611-2612-2613-2614-2615-2616-2617-2618-2619-2620-2621-2622-2623-2624-2625-2626-2627-2628-2629-2630-2631-2632-2633-2634-2635-2636-2637-2638-2639-2640-2641-2642-2643-2644-2645-2646-2647-2648-2649-2650-2651-2652-2653-2654-2655-2656-2657-2658-2659-2660-2661-2662-2663-2664-2665-2666-2667-2668-2669-2670-2671-2672-2673-2674-2675-2676-2677-2678-2679-2680-2681-2682-2683-2684-2685-2686-2687-2688-2689-2690-2691-2692-2693-2694-2695-2696-2697-2698-2699-2700-2701-2702-2703-2704-2705-2706-2707-2708-2709-2710-2711-2712-2713-2714-2715-2716-2717-2718-2719-2720-2721-2722-2723-2724-2725-2726-2727-2728-2729-2730-2731-2732-2733-2734-2735-2736-2737-2738-2739-2740-2741-2742-2743-2744-2745-2746-2747-2748-2749-2750-2751-2752-2753-2754-2755-2756-2757-2758-2759-2760-2761-2762-2763-2764-2765-2766-2767-2768-2769-2770-2771-2772-2773-2774-2775-2776-2777-2778-2779-2780-2781-2782-2783-2784-2785-2786-2787-2788-2789-2790-2791-2792-2793-2794-2795-2796-2797-2798-2799-2800-2801-2802-2803-2804-2805-2806-2807-2808-2809-2810-2811-2812-2813-2814-2815-2816-2817

1990 1991 1992 1993 1994

No complaint is made as to the rulings of the court on the evidence or the instructions. The first contention made by appellant is that the court erred in refusing to direct a verdict at the close of appellees' evidence and again at the close of all of the evidence, motions to that effect having been made by appellant.

Without going into a detailed discussion of the evidence, it is only necessary for us to say that taking the evidence of the appellees' as true with all reasonable inferences to be drawn therefrom, it fairly tended to prove their case. The court, therefore, did not

In the

UNITED STATES COURT OF DISTRICT

Second District

October Term, A.D., 1928.

JAMES T. O'NEILL and

LARRY LOGAN,

(Trading as O'NEILL and

LOGAN)

Appellants,

-vs-

FISHER BROTHERS AND COMPANY, INC.

Appellees.

Appeal by writ of certiorari.

An action in remonstrance was instituted by appellees against

appellant in the Circuit Court of Talbot County to recover for

potatoes alleged to have been sold to appellant. In the decision,

appellant filed a writ of the general issue. A trial was had resulting

in a verdict and judgment in favor of appellees for \$12.00. To reverse

said judgment this appeal is prosecuted.

No complaint is made as to the rulings of the court on the

evidence on the instructions. The first contention made by appellant

is that the court acted in refusing to direct a verdict of the case

of appellees' evidence and again at the close of all of the evidence,

motion to set aside being made by appellant.

Without going into a detailed discussion of the evidence,

it is only necessary for us to say that taking the evidence of the

appellees, as true with all reasonable inferences to be drawn therefrom,

it fairly tends to prove their case. The court, therefore, did not



err in denying said motions.

It is next contended that the verdict is against the manifest weight of the evidence. The evidence on the part of the appellees is to the effect that they had been buying car-loads lots of potatoes which they had been selling out to retailers. That in December 1926, appellant inquired of appellees if they had any potatoes for sale and that they informed him they had about 200 bushels stored in the cellar of one Poffenberger. Appellee, Lavie Logan, testified that "he (Fisher) went down and looked at them and opened up about a half dozen sacks, and there were also about 75 bushels that Poffenberger had bought, and that he had them in the bin there; he looked them over and said to bring them up in his cellar, and we would weigh them up. \* \* \* He said he would like to have them looked over; they were weighed on his scales; we went down in a couple of nights and emptied them out and looked them over and then sacked them; he done the weighing himself; he stood right there, and they were put away; he said they were all right. He said to come down in a couple of days and he would give us a check." This witness further testified that he did not go down for some two or three days and that at the time appellant stated that he wasn't satisfied; that thereafter Fisher notified the state authorities to send an inspector to inspect said potatoes; that when said potatoes were first examined and weighed up, appellees culled out some of the damaged potatoes probably not more than a bushel or two and after said complaint was made by Fisher, it was finally agreed that appellees should again sort over said potatoes; that they did so and some twenty bushels or more were culled therefrom; Fisher still refused to pay for said potatoes. A long in April, 1927, a proceeding was had before a Justice of the Peace to condemn said potatoes, and they were so condemned. The evidence on the part of appellees was to the effect that the potatoes, after being sorted, were in good condition.

The evidence also on the part of appellees is to the effect that there was a six inch heating pipe running along the ceiling over said potatoes the full length of appellant's cellar.

Appellee Ortscheid testified that they sorted said potatoes

ent in jumping with evidence.

It is well known that the variety is similar to

manifest weight of the evidence. The evidence on the part of the

appeals is to the effect that they had been saying for some time

potatoes which they had been selling and so forth. That is, however

1936, appellant informed of appellant if they had any potatoes for sale

and that they informed him they had about 200 pounds of potatoes in the

cellar of one of the houses. Appellant, having known, testified that the

(Fisher) went down and looked at them and opened up about a half dozen

sacks, and there were also about 75 pounds of potatoes in the house,

and that he had them in the house; he looked them over and said he

bring them up in his cellar, and we would weigh them up. \* \* \* He said

he would like to have them looked over; they were weighed on the scales;

we went down in a couple of days and weighed them up and looked them

over and there were about 200; he took the potatoes himself; he stood there

there, and they were put away; he said they were all right. He said he

come down in a couple of days and he would give us a check. This was

near the time testified that he did not go down to see him for some

days and that after some time appellant asked that he would be weighed;

thereafter Fisher notified the other witnesses to come to the house

to inspect said potatoes; that they all believed were first quality

and weighed up, and they all believed out some of the best potatoes

probably not more than a bushel or two and after said weighing was made

by Fisher, it was finally agreed that appellant should write out a

bill of potatoes; that they did so and some twenty pounds or more were

weighed and paid for; Fisher still refused to pay for said potatoes. It was

in April, 1937, a proceeding was had before a Justice of the Peace to

confirm said agreement, and they were so confirmed. The balance of the

part of appellant was to the effect that the potatoes, after being weighed,

were in good condition.

The evidence also on the part of appellant is to the effect

that there was a fine basket of apples given him by the other party

said parties the full amount of appellant's bill.

Appellant testified that they weighed said apples



when they were first taken to appellant's cellar; that "Fisher came down and the man that works for him (Lahre) just the three of us; nothing was said at that time that I remember of; he continued weighing them up until he weighed them all up and piled in the bin; he made no objection to the price; potatoes dropped in the market shortly after that; \* \* \* he said he wouldn't take the potatoes; that was some weeks afterwards."

This witness further testified that when the inspector was there Fisher stated "if we sorted the potatoes over, they could be sorted over and they would be all right, and he would take them if we sorted them over; nothing else was said when Lewis was there that I remember."

The testimony on the part of appellant is to the effect that he would agreed to buy the potatoes at \$1.50 per bushel and that they were weighed up in his cellar but that the potatoes never were of good quality and were not such after they had been sorted. Appellant testified that in the first conversation he had with appellees he stated, "If you will take and sort them, and give me nothing but good potatoes, I will take them. \* \* \* You can take the potatoes up to my cellar, as there is water in this cellar and a dirt floor, and you can sort them up there. \* \* \* I came down to the basement at one time they were there--one of them would pick up a sack and run it into another, which the other would hold, and if they saw a potato that was bad they would throw it out; that is the way they were sorted; a good many of them <sup>were</sup> rotted, and the potato, when you cut it open, you would find under the skin a blight, brown in color, and it would run different, no two alike."

Appellant further testified that later on he stated to appellee Ortscheid that if they would sort the potatoes that he (appellant) would be willing to pay for what were good; that appellee Ortscheid replied, "'Before we do that, we will come and get them,' and I said, 'All right, that will suit me,' so I asked when they would get them, and they said on the following Monday." That appellees did not come on Monday and that he (appellant) called them; that appellee



when they were first taken to Special Agent's cell; and "never  
come down and the day after that the day after that  
nothing was said at that time that I remember it; he continued talking  
them up until he walked into the cell in the day; he said he  
objection to the trial; he was in the court; he said he  
that; \* \* \* he said he would be the witness; they were some cases  
elsewhere."

This witness further testified that when the last person was there Fisher stated "it is almost the hundred mark, that would be sorted out and that would be all right, and he would take from 10 to 20 sorted ones every rotation after and a lot more than that was there that I remember."

The testimony on the part of a person is to the effect that he would agree to pay the balance of \$1.50 per bushel and that the were weighed up in the cellar but that the witness never saw it weighed and was not even after they had been weighed. The witness testified that in the first conversation he had with the witness he stated, "If you will take and count them, and give me nothing but good potatoes, I will take them." \* \* \* You can take the balance of the cellar, as there is water in this cellar and a little there, and you can sort them up there. \* \* \* I came down in the basement at the time they were there--one of them would pick up a sack and run it into another, which the other would fill, and it took out a potato that was bad and would throw it out; that is the way they were sorted; a good many of them, I think, and the witness, when you put it down, you would find under the skin a slight, brownish color, and it would be different, as you like."

[illegible]

Ortscheid came and stated that they weren't going to take the potatoes back and that he (appellant) had bought them and that they were going to force him to pay for them.

The evidence on the part of appellees is to the effect that after the potatoes were first sorted about 185 bushels were weighed up. Appellant testified that 176 bushels were weighed up. He further testified that "about twenty-five per cent of the potatoes were bad." It is conceded that the price to be paid for the potatoes was \$1.50 per bushel. The verdict being for \$187.50 would indicate that the jury had based their verdict on 125 bushels of potatoes at \$1.50 per bushel. Counsel for appellant contends that if appellees are entitled to recover, it is for 185 bushels at \$1.50 per bushel, and that the verdict is illogical. A defendant cannot successfully complain that the verdict against him is too small. The plaintiff only is entitled to so urge. Wright v. Griffey, 44 App. 115-117; aff'd 146 Ill. 394; Morgan and Wright v. McCaslin, 114 App 427-431; aff'd 213 Ill. 358; Jones v. Bates, 179 App. 578-584; Becker v. People 164 Ill. 267-273; Heymann v. Heymann, 210 Ill. 524-540.

While the evidence is somewhat conflicting, it amply sustains the verdict. The court therefore did not err in overruling the motion for a new trial.

For the reasons above set forth the judgment of the trial court will be affirmed.

Judgment affirmed.





STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this \_\_\_\_\_ day of  
\_\_\_\_\_ in the year of our Lord one thousand  
nine hundred and twenty \_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



70222  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in  
the year of our Lord one thousand nine hundred and twenty-eight,  
within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 665<sup>1</sup>

BE IT REMEMBERED, that afterwards, to-wit: On

DEC 1 1928 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





In The  
APPELLATE COURT OF ILLINOIS  
Second District

October Term, A.D., 1928.

|                                                              |   |                                |
|--------------------------------------------------------------|---|--------------------------------|
| FIRST TRUST & SAVINGS BANK OF<br>PEORIA, ILL.,<br>Appellant, | } |                                |
| vs.                                                          | } | Appeal from Kendall<br>County. |
| EDDIE N. SHERMAN, et al,<br>Appellees.                       | } |                                |

OPINION BY BOGGS, J.

On March 6, 1928, appellant filed a bill in the Circuit Court of Kendall County against appellees Eddie N. Sherman, Anita Sherman, Mary O. Bunton, William E. Gould and certain other defendants, to fore-close the hereinafter-mentioned trust deed.

Said bill alleged, among other things, that on July 15, 1922, appellees Eddie N. Sherman and Anita Sherman, his wife, being indebted in the sum of \$21,000, executed and delivered to The Savings Bank of Kewanee twenty-one notes, signed by said mortgagors, with interest from date at the rate of 6% per annum, payable annually, as evidenced by certain coupon notes thereto attached; that "there are now due twenty (20) of said one thousand dollar (\$1,000.00) principal notes, together with the one coupon interest note, being number five, due July 15, 1927."

The bill further alleges that, to secure said notes, on July 15, 1922, appellees Eddie N. Sherman and Anita Sherman, his wife executed a trust deed to John Fisher, on about 170 acres of farm land in said county, which said deed was duly filed for record in said county; that said trust deed provided for the payment of reasonable solicitor's fees

In the

APPELLATE COURT OF ILLINOIS

Second District

October Term, A.D., 1932.

FIRST TRUST & SAVINGS BANK OF  
PEORIA, ILL.,  
Appellant.

vs.

EDDIE W. BURTON, et al.,  
Appellees.

Special Term  
Peoria.

EDDIE W. BURTON, et al.

On March 6, 1932, appellant filed a bill in the circuit

Court of Peoria County against appellees Eddie W. Burton, Annie Burton,  
Harry G. Burton, William E. Davis and certain other defendants, to have

close the hereinbefore-mentioned trust deed.

Said bill alleged, among other things, that on July 12, 1912,

appellees Eddie W. Burton and Annie Burton, his wife, being interested

in the sum of \$11,000, executed and delivered to the certain bank

of Peoria County a certain note, signed by said mortgagors, with interest

from date at the rate of 12 per annum, payable annually, as evidenced by

certain copies of said note attached; that there are now due and owing to

of said bank the sum of \$11,000.00 principal with interest with

the one hundred percent note, being answer five, and July 12, 1912.

The bill further alleged that, to secure said note, on July

12, 1912, appellees Eddie W. Burton and Annie Burton, his wife, executed

ed a trust deed to John Burton, on which the same is now held by said

bank, which said deed was duly filed for record in said county, that

said trust deed provided for the payment of the principal and interest



in case of the foreclosure thereof, and for the payment of the taxes, etc., on said premises; that certain subsequent trust deeds or mortgages were placed on said premises, but that the same were subsequent and inferior to the trust deed here involved, the parties interested therein being made parties defendant to said bill.

Said bill further alleged that John Fisher, the trustee above named, died on August 1, 1926, and that, by the terms of said trust deed, appellee William E. Gould became the successor in trust to said Fisher; that on February 4, 1927, the said William E. Gould duly assigned said trust deed to the complainant, which said assignment was filed for record in said county on February 7, 1927.

Said bill further alleges that the complainant is the holder of the twenty notes above mentioned, and prays a foreclosure of said trust deed.

To said bill, appellee Mary O. Bunton filed an answer, admitting the making and execution of said twenty-one promissory notes and the execution of said trust deed, as set forth in said bill. Said defendant further alleged in her answer that she was the owner of one of said \$1,000 notes secured by said trust deed, dated July 15, 1922, for the sum of \$1,000, signed by Eddie N. Sherman and Anita Sherman, "Payable to the order of Myself" and endorsed in blank by Eddie N. Sherman and Anita Sherman.

Said defendant further alleged that she, as the holder of said note, was entitled to an "equal right and proportion to the lien claimed by the complainant in this suit."

On the hearing of said cause, in open court, the court entered a decree for the foreclosure of said trust deed, and held that the same secured said twenty-one notes of \$1,000 each, twenty of which were held by appellant, and one of which was held by appellee Mary O. Bunton; and ordered that, on the sale of said premises, the note held by Mary O. Bunton should stand on an equal footing with the notes held by appellant.



To reverse said decree, this appeal is prosecuted.

It is contended by appellant that the court erred in decreeing the note held by appellee Mary C. Bunton to be one of the series secured by said trust deed and entitled to participate in the proceeds of the sale of said mortgaged premises.

On the hearing of said cause, John A. Olson, a witness on behalf of appellant, testified that he was assistant cashier of the First Trust & Savings Bank of Peoria. He was asked the following questions and gave the following answers thereto:

"Q. Did you ever see the twenty-first note that is described in the trust deed, offered in evidence?

"A. Yes.

"Q. When did you see it, with reference to the delivery to you of the other twenty notes?

"A. The loan was originally for \$21,000.00, and the twenty-first note for \$1,000.00 was with the loan when we received it. We objected to the loan of \$21,000.00; thought it was 'top-heavy'. We figured the loan of \$20,000.00 was large enough, and we were willing to make that loan. The other note was returned to the Savings Bank of Kewanee and the loan reduced to \$20,000.00.

"Q. Did you again see that twenty-first note?

"A. Yes, it was sent to us by letter from the Savings Bank of Kewanee, canceled.

"Q. Did you see the cancellation mark?

"A. Yes, I did.

"Q. In what way was it canceled?

"A. I don't just recall now, but it was stamped, marked or obliterated in some way as to cancel it.

"Q. Then what was done with this twenty-first note?

"A. Returned to the Savings Bank of Kewanee, who negotiated the loan in this case."



To reverse this action, correct the error of

Approved by the Board of Directors of the Corporation of the City of New York

of the sale of said property.

accounted by said trust deed was retained as evidence in the proceeds

ing the same held in custody until it should be sold or otherwise disposed

and gave the following answers:

First & Savings Bank of Boston. He was asked the following questions:

half of appellant, testified that he was called to the bank

on the morning of said date, and a check was given to him

[illegible]

• 25 • • 6 •

and at similar rate of increase (20% per year) as the

No. 1987 note cut to

13. The law was originally for 10, 20, 30, 40, 50, 60, 70, 80, 90, 100, 110, 120, 130, 140, 150, 160, 170, 180, 190, 200, 210, 220, 230, 240, 250, 260, 270, 280, 290, 300, 310, 320, 330, 340, 350, 360, 370, 380, 390, 400, 410, 420, 430, 440, 450, 460, 470, 480, 490, 500, 510, 520, 530, 540, 550, 560, 570, 580, 590, 600, 610, 620, 630, 640, 650, 660, 670, 680, 690, 700, 710, 720, 730, 740, 750, 760, 770, 780, 790, 800, 810, 820, 830, 840, 850, 860, 870, 880, 890, 900, 910, 920, 930, 940, 950, 960, 970, 980, 990, 1000, 1010, 1020, 1030, 1040, 1050, 1060, 1070, 1080, 1090, 1100, 1110, 1120, 1130, 1140, 1150, 1160, 1170, 1180, 1190, 1200, 1210, 1220, 1230, 1240, 1250, 1260, 1270, 1280, 1290, 1300, 1310, 1320, 1330, 1340, 1350, 1360, 1370, 1380, 1390, 1400, 1410, 1420, 1430, 1440, 1450, 1460, 1470, 1480, 1490, 1500, 1510, 1520, 1530, 1540, 1550, 1560, 1570, 1580, 1590, 1600, 1610, 1620, 1630, 1640, 1650, 1660, 1670, 1680, 1690, 1700, 1710, 1720, 1730, 1740, 1750, 1760, 1770, 1780, 1790, 1800, 1810, 1820, 1830, 1840, 1850, 1860, 1870, 1880, 1890, 1900, 1910, 1920, 1930, 1940, 1950, 1960, 1970, 1980, 1990, 2000, 2010, 2020, 2030, 2040, 2050, 2060, 2070, 2080, 2090, 2100, 2110, 2120, 2130, 2140, 2150, 2160, 2170, 2180, 2190, 2200, 2210, 2220, 2230, 2240, 2250, 2260, 2270, 2280, 2290, 2300, 2310, 2320, 2330, 2340, 2350, 2360, 2370, 2380, 2390, 2400, 2410, 2420, 2430, 2440, 2450, 2460, 2470, 2480, 2490, 2500, 2510, 2520, 2530, 2540, 2550, 2560, 2570, 2580, 2590, 2600, 2610, 2620, 2630, 2640, 2650, 2660, 2670, 2680, 2690, 2700, 2710, 2720, 2730, 2740, 2750, 2760, 2770, 2780, 2790, 2800, 2810, 2820, 2830, 2840, 2850, 2860, 2870, 2880, 2890, 2900, 2910, 2920, 2930, 2940, 2950, 2960, 2970, 2980, 2990, 3000, 3010, 3020, 3030, 3040, 3050, 3060, 3070, 3080, 3090, 3100, 3110, 3120, 3130, 3140, 3150, 3160, 3170, 3180, 3190, 3200, 3210, 3220, 3230, 3240, 3250, 3260, 3270, 3280, 3290, 3300, 3310, 3320, 3330, 3340, 3350, 3360, 3370, 3380, 3390, 3400, 3410, 3420, 3430, 3440, 3450, 3460, 3470, 3480, 3490, 3500, 3510, 3520, 3530, 3540, 3550, 3560, 3570, 3580, 3590, 3600, 3610, 3620, 3630, 3640, 3650, 3660, 3670, 3680, 3690, 3700, 3710, 3720, 3730, 3740, 3750, 3760, 3770, 3780, 3790, 3800, 3810, 3820, 3830, 3840, 3850, 3860, 3870, 3880, 3890, 3900, 3910, 3920, 3930, 3940, 3950, 3960, 3970, 3980, 3990, 4000, 4010, 4020, 4030, 4040, 4050, 4060, 4070, 4080, 4090, 4100, 4110, 4120, 4130, 4140, 4150, 4160, 4170, 4180, 4190, 4200, 4210, 4220, 4230, 4240, 4250, 4260, 4270, 4280, 4290, 4300, 4310, 4320, 4330, 4340, 4350, 4360, 4370, 4380, 4390, 4400, 4410, 4420, 4430, 4440, 4450, 4460, 4470, 4480, 4490, 4500, 4510, 4520, 4530, 4540, 4550, 4560, 4570, 4580, 4590, 4600, 4610, 4620, 4630, 4640, 4650, 4660, 4670, 4680, 4690, 4700, 4710, 4720, 4730, 4740, 4750, 4760, 4770, 4780, 4790, 4800, 4810, 4820, 4830, 4840, 4850, 4860, 4870, 4880, 4890, 4900, 4910, 4920, 4930, 4940, 4950, 4960, 4970, 4980, 4990, 5000, 5010, 5020, 5030, 5040, 5050, 5060, 5070, 5080, 5090, 5100, 5110, 5120, 5130, 5140, 5150, 5160, 5170, 5180, 5190, 5200, 5210, 5220, 5230, 5240, 5250, 5260, 5270, 5280, 5290, 5300, 5310, 5320, 5330, 5340, 5350, 5360, 5370, 5380, 5390, 5400, 5410, 5420, 5430, 5440, 5450, 5460, 5470, 5480, 5490, 5500, 5510, 5520, 5530, 5540, 5550, 5560, 5570, 5580, 5590, 5600, 5610, 5620, 5630, 5640, 5650, 5660, 5670, 5680, 5690, 5700, 5710, 5720, 5730, 5740, 5750, 5760, 5770, 5780, 5790, 5800, 5810, 5820, 5830, 5840, 5850, 5860, 5870, 5880, 5890, 5900, 5910, 5920, 5930, 5940, 5950, 5960, 5970, 5980, 5990, 6000, 6010, 6020, 6030, 6040, 6050, 6060, 6070, 6080, 6090, 6100, 6110, 6120, 6130, 6140, 6150, 6160, 6170, 6180, 6190, 6200, 6210, 6220, 6230, 6240, 6250, 6260, 6270, 6280, 6290, 6300, 6310, 6320, 6330, 6340, 6350, 6360, 6370, 6380, 6390, 6400, 6410, 6420, 6430, 6440, 6450, 6460, 6470, 6480, 6490, 6500, 6510, 6520, 6530, 6540, 6550, 6560, 6570, 6580, 6590, 6600, 6610, 6620, 6630, 6640, 6650, 6660, 6670, 6680, 6690, 6700, 6710, 6720, 6730, 6740, 6750, 6760, 6770, 6780, 6790, 6800, 6810, 6820, 6830, 6840, 6850, 6860, 6870, 6880, 6890, 6900, 6910, 6920, 6930, 6940, 6950, 6960, 6970, 6980, 6990,

1. The first of these is the fact that the Commission has not yet received any information from the Government of the Republic of China (Taiwan) regarding the status of the 1954 Convention. It is therefore not possible to determine whether the Convention is still in force or whether it has been terminated.

THE ABOVE INFORMATION WAS OBTAINED FROM THE RECORDS OF THE  
FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE

[illegible]

1997-1998 1999-2000 2000-2001 2001-2002 2002-2003 2003-2004 2004-2005 2005-2006 2006-2007 2007-2008 2008-2009 2009-2010 2010-2011 2011-2012 2012-2013 2013-2014 2014-2015 2015-2016 2016-2017 2017-2018 2018-2019 2019-2020 2020-2021 2021-2022 2022-2023 2023-2024 2024-2025 2025-2026 2026-2027 2027-2028 2028-2029 2029-2030 2030-2031 2031-2032 2032-2033 2033-2034 2034-2035 2035-2036 2036-2037 2037-2038 2038-2039 2039-2040 2040-2041 2041-2042 2042-2043 2043-2044 2044-2045 2045-2046 2046-2047 2047-2048 2048-2049 2049-2050 2050-2051 2051-2052 2052-2053 2053-2054 2054-2055 2055-2056 2056-2057 2057-2058 2058-2059 2059-2060 2060-2061 2061-2062 2062-2063 2063-2064 2064-2065 2065-2066 2066-2067 2067-2068 2068-2069 2069-2070 2070-2071 2071-2072 2072-2073 2073-2074 2074-2075 2075-2076 2076-2077 2077-2078 2078-2079 2079-2080 2080-2081 2081-2082 2082-2083 2083-2084 2084-2085 2085-2086 2086-2087 2087-2088 2088-2089 2089-2090 2090-2091 2091-2092 2092-2093 2093-2094 2094-2095 2095-2096 2096-2097 2097-2098 2098-2099 2099-2100 2100-2101 2101-2102 2102-2103 2103-2104 2104-2105 2105-2106 2106-2107 2107-2108 2108-2109 2109-2110 2110-2111 2111-2112 2112-2113 2113-2114 2114-2115 2115-2116 2116-2117 2117-2118 2118-2119 2119-2120 2120-2121 2121-2122 2122-2123 2123-2124 2124-2125 2125-2126 2126-2127 2127-2128 2128-2129 2129-2130 2130-2131 2131-2132 2132-2133 2133-2134 2134-2135 2135-2136 2136-2137 2137-2138 2138-2139 2139-2140 2140-2141 2141-2142 2142-2143 2143-2144 2144-2145 2145-2146 2146-2147 2147-2148 2148-2149 2149-2150 2150-2151 2151-2152 2152-2153 2153-2154 2154-2155 2155-2156 2156-2157 2157-2158 2158-2159 2159-2160 2160-2161 2161-2162 2162-2163 2163-2164 2164-2165 2165-2166 2166-2167 2167-2168 2168-2169 2169-2170 2170-2171 2171-2172 2172-2173 2173-2174 2174-2175 2175-2176 2176-2177 2177-2178 2178-2179 2179-2180 2180-2181 2181-2182 2182-2183 2183-2184 2184-2185 2185-2186 2186-2187 2187-2188 2188-2189 2189-2190 2190-2191 2191-2192 2192-2193 2193-2194 2194-2195 2195-2196 2196-2197 2197-2198 2198-2199 2199-2200 2200-2201 2201-2202 2202-2203 2203-2204 2204-2205 2205-2206 2206-2207 2207-2208 2208-2209 2209-2210 2210-2211 2211-2212 2212-2213 2213-2214 2214-2215 2215-2216 2216-2217 2217-2218 2218-2219 2219-2220 2220-2221 2221-2222 2222-2223 2223-2224 2224-2225 2225-2226 2226-2227 2227-2228 2228-2229 2229-2230 2230-2231 2231-2232 2232-2233 2233-2234 2234-2235 2235-2236 2236-2237 2237-2238 2238-2239 2239-2240 2240-2241 2241-2242 2242-2243 2243-2244 2244-2245 2245-2246 2246-2247 2247-2248 2248-2249 2249-2250 2250-2251 2251-2252 2252-2253 2253-2254 2254-2255 2255-2256 2256-2257 2257-2258 2258-2259 2259-2260 2260-2261 2261-2262 2262-2263 2263-2264 2264-2265 2265-2266 2266-2267 2267-2268 2268-2269 2269-2270 2270-2271 2271-2272 2272-2273 2273-2274 2274-2275 2275-2276 2276-2277 2277-2278 2278-2279 2279-2280 2280-2281 2281-2282 2282-2283 2283-2284 2284-2285 2285-2286 2286-2287 2287-2288 2288-2289 2289-2290 2290-2291 2291-2292 2292-2293 2293-2294 2294-2295 2295-2296 2296-2297 2297-2298 2298-2299 2299-2300 2300-2301 2301-2302 2302-2303 2303-2304 2304-2305 2305-2306 2306-2307 2307-2308 2308-2309 2309-2310 2310-2311 2311-2312 2312-2313 2313-2314 2314-2315 2315-2316 2316-2317 2317-2318 2318-2319 2319-2320 2320-2321 2321-2322 2322-2323 2323-2324 2324-2325 2325-2326 2326-2327 2327-2328 2328-2329 2329-2330 2330-2331 2331-2332 2332-2333 2333-2334 2334-2335 2335-2336 2336-2337 2337-2338 2338-2339 2339-2340 2340-2341 2341-2342 2342-2343 2343-2344 2344-2345 2345-2346 2346-2347 2347-2348 2348-2349 2349-2350 2350-2351 2351-2352 2352-2353 2353-2354 2354-2355 2355-2356 2356-2357 2357-2358 2358-2359 2359-2360 2360-2361 2361-2362 2362-2363 2363-2364 2364-2365 2365-2366 2366-2367 2367-2368 2368-2369 2369-2370 2370-2371 2371-2372 2372-2373 2373-2374 2374-2375 2375-2376 2376-2377 2377-2378 2378-2379 2379-2380 2380-2381 2381-2382 2382-2383 2383-2384 2384-2385 2385-2386 2386-2387 2387-2388 2388-2389 2389-2390 2390-2391 2391-2392 2392-2393 2393-2394 2394-2395 2395-2396 2396-2397 2397-2398 2398-2399 2399-2400 2400-2401 2401-2402 2402-2403 2403-2404 2404-2405 2405-2406 2406-2407 2407

10. The above information was obtained from the records of the Department of the Interior, Bureau of Land Management, and is being furnished to you for your information.

... .., ... ..

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1920

Figure 2.10: A plot of the function  $f(x) = \sin(x)$  for  $x \in [0, 2\pi]$ . The x-axis is labeled  $x$  and ranges from 0 to  $2\pi$ . The y-axis is labeled  $f(x)$  and ranges from -1 to 1. The curve starts at (0,0), reaches a maximum at  $(\pi/2, 1)$ , crosses the x-axis at  $(\pi, 0)$ , reaches a minimum at  $(3\pi/2, -1)$ , and ends at  $(2\pi, 0)$ .

Le tableau ci-dessous résume les résultats obtenus pour les différents scénarios.

2.1. *Exposure to an acute dose of polystyrene*

How long does it take to get a new book made? . . .

1. *Adaptation* – the process by which an organism becomes better suited to its environment.

• 1999-2000 100.000 100.000

This testimony was objected to by counsel for appellee Mary O. Bunton. The court stated: "My impression is that it is not competent," but admitted it, subject to objection.

On her own behalf, appellee Mary O. Bunton testified without objection that the note in question was her property; that she obtained it from her sister, and that her sister had purchased said note at The Savings Bank of Kewanee. On cross examination, she stated that she had no knowledge with reference to the note, except what had been told her; that the interest on the note, up until the last interest payment, was paid by The Savings Bank of Kewanee. Said note was then offered in evidence and being objected to by appellant, was admitted subject to objection.

The foregoing is the substance of all of the testimony heard by the court, both for appellant and for appellee Mary O. Bunton, on the question of her right to have said note held a lien against the property in question and to participate in the proceeds of said foreclosure.

Appellant is not in a very good situation to object to the allowance of the note held by appellee Mary O. Bunton, for the reason that, in its bill it fails to raise that issue.

In order to contest the claim of appellee Mary O. Bunton, appellant should have tendered an issue thereon in its bill as originally filed, or, after the answer of said appellee was filed, should have amended its bill so as to present that issue. As the record stands, there was no issue of the character contended for by counsel for appellant.

The allegations and proofs must correspond. A party cannot recover on a good bill without proof; neither can he recover on sufficient proof without proper allegations. Leahy v. Nolan, 261 Ill. 219-221; Houlihan v. Morrissey, 271 Ill. 66-70; Fisher v. Burks, 274 Ill. 363. In the latter case, the court at page 367, says:

"It is fundamental principle of law that a party must stand or fall by the material allegations of his bill. He cannot be permitted to state a case one way in his bill and make another and different case

This testimony was objected to as hearsay but admitted by the court. The court stated: "By implication it is not hearsay, but admitted as evidence."

On her own behalf, appellee made the following statement: objection that the note in question was not properly made and that it is from her sister, and that for many years she has been in the hands of the bank of America. The court stated: "The court has no knowledge with reference to the note, and the fact that she has that the interest on the note, as well as the bank of America, was paid by the bank of America. This note was then offered in evidence and being objected to by appellee, was admitted subject to objection."

The testimony in the evidence of all on the testimony made by the court, both for appellee and for appellee Mary A. Hunter, on the question of the right to have said note held a lien against the property in question and as evidence in the records of said testimony. Appellee is not in a very good situation as to the evidence of the note held by appellee Mary A. Hunter, for the reason that, in the bill as filed by said appellee.

In order to protect the title of appellee Mary A. Hunter, appellee should have declared as such between the bill as originally filed, and after the answer of said appellee was filed, would have amended the bill so as to present this claim. In the present case, there was no issue of the ownership of the property in question. The allegations and facts were stated. A court cannot be open to a party who claims property without any evidence to substantiate the same. The court stated: "The court has no knowledge with reference to the note, and the fact that she has that the interest on the note, as well as the bank of America, was paid by the bank of America. This note was then offered in evidence and being objected to by appellee, was admitted subject to objection."

It is suggested that the bill as filed by the appellee should be amended to state a case and not in the bill as now framed and directed to the court.



by the testimony. The allegations of the bill, proof and the decree must correspond. One is not entitled to recover unless there are averments in the bill to support the evidence. Fish v. Cleland, 33 Ill. 238; Carmichael v. Reed, 45 id. 108; Stearns v. Glos, 235 id. 290; Wilson v. Wilson, 268 id. 270."

Appellant fails in both particulars. Its bill is not sufficient upon which to contest appellee's claim, even if the evidence were. On the other hand, the evidence is not sufficient to defeat her claim, even though proper allegations had been made in the bill.

For the reasons above set forth, the decree of the chancellor will be affirmed.

Decree affirmed.



STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this \_\_\_\_\_ day of  
\_\_\_\_\_ in the year of our Lord one thousand  
nine hundred and twenty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*





AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and twenty-eight, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. FRANKLIN H. BOGGS, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

250 I.A. 665<sup>2</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On  
DE. 1928 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





In The  
APPELLATE COURT OF ILLINOIS  
Second District  
October Term, A.D., 1928

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|                     |   |                   |
|---------------------|---|-------------------|
| GLENN W. LEAHY,     | ) |                   |
| Defendant in Error, | ) |                   |
|                     | ) |                   |
| vs.                 | ) | Error to          |
|                     | ) | Circuit Court     |
| EILEEN CARROTT,     | ) | Winnebago County. |
| Plaintiff in Error. | ) |                   |

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OPINION by BOGGS, J.

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An action on the case was instituted by defendant in error, hereinafter referred to as plaintiff, against plaintiff in error, hereinafter referred to as defendant, in the circuit court of Winnebago County, to recover damages for injuries, charged to have been caused by the alleged negligent operation of an automobile by defendant.

Said action was originally instituted against William F. Carrott, the husband of defendant, as the owner of said automobile. Thereafter, defendant was made a party to said suit. The original declaration ran against William F. Carrott only. After joining the defendant herein, four additional counts were filed, and said cause was dismissed as to William F. Carrott. To said declaration, defendant filed a plea of the general issue and an additional plea denying ownership of said automobile. A trial was had, resulting in a verdict and judgment in favor of plaintiff for \$2,500. To reverse said judgment, this appeal is prosecuted.

Plaintiff resides in Decatur, Illinois, is thirty-one years of age, and is the county veterinarian of Macan County. On August 17, 1927, he, in company with his sister, a Mrs. White,

In The

ALABAMA COURT OF REPORTS

Second District

October Term, A.D., 1928

By reason of  
the fact that  
the defendant  
is a minor.

CLARENCE W. HANLEY,  
Defendant in Error,  
vs.  
EILEEN CARROLL,  
Plaintiff in Error.

WRITING BY COURT, 1.

In action on this case was instituted by defendant in error, carelessly referred to as plaintiff, against plaintiff in error, carelessly referred to as defendant, in the circuit court of Birmingham County, to recover damages for injuries, claiming to have been caused by the alleged negligent operation of an automobile by defendant.

Said action was originally instituted against William F. Garrott, the husband of defendant, as the owner of said automobile. Thereafter, defendant was made a party to said suit. The original decision was against William F. Garrott only. After joining the defendant herein, four additional counts were filed, and said action was dismissed as to William F. Garrott. No suit was instituted against a piece of the general issue and an additional piece against ownership of said automobile. A trial was had, resulting in a verdict and judgment in favor of plaintiff for \$2,500. The return said judgment, this appeal is prosecuted.

Plaintiff resides in Bessey, Illinois, is thirty-one years of age, and is the county clerk of said county. On August 14, 1927, he, in company with his father, a Mrs. White,

drove from Decatur to Rockford in a Ford coupe. They spent the night at Rockford with defendant, another sister. On the following day, on invitation of defendant, plaintiff and Mrs. White drove from Rockford to Darlington, Wisconsin, in a four-passenger Nash coupe. There was a receptacle or tool box back of the driver's seat, a double seat to the right of said tool box, and a folding seat in front to the right of the driver's seat. On the trip from Rockford to Darlington, plaintiff did the driving. About nine o'clock on the morning of the accident said parties started on the return trip to Rockford, defendant doing the driving. Plaintiff and Mrs. White occupied the two-passenger seat. The road out of Darlington is a gravel-surfaced, state patrolled highway of Wisconsin, about 24 to 25 feet in width. One John F. Simmons, state patrolman, testified: "The road from Darlington \* \* \* is a rolling road all the way. It is graveled, newly graveled about a year ago. \* \* \* The road prior to being surfaced was newly graded, and was 24 feet wide from shoulder to shoulder, and had been graveled practically six weeks and had been worked with a motor grader about two days a week. \* \* \* The surface of the road was as hard as could be expected. There was very little loose gravel there. There was a little on the outside, but the track was good."

Plaintiff testified that defendant operated said automobile at a speed around forty miles per hour. Mrs. White testified that defendant was driving, "I should judge from forty to forty-five miles per hour." At a point about nine miles from Darlington, said road passes over a hill or crest, where the occupants of an automobile cannot see the road beyond the crest of the hill. Defendant did not slacken the speed of the automobile as it approached the crest of the hill, and on its descent, the car begun to skid, ran into a bank at the side of the road and overturned, and plaintiff received the injuries for which this suit is brought.

The injuries to plaintiff were serious and consisted,



grove from Des Moines to Rockford in a Ford coupe. This was the night of Rockford with defendant, another driver. On the following day, on invitation of defendant, plaintiff and Mrs. John Henry from Rockford to Burlington, Wisconsin, in a two-passenger Ford coupe. There was a receipt on both box seats of the driver's seat, a double seat to the right of self and box, and a folding seat in front to the right of the driver's seat. In the trip from Rockford to Burlington, plaintiff and Mrs. Henry. About nine o'clock on the morning of the accident said parties started on the return trip to Rockford, defendant driving the driving. Plaintiff and Mrs. Henry occupied the two-passenger seat. The road out of Burlington is a gravel-surfaced, state-maintained highway of Wisconsin, about 24 to 25 feet in width. One John L. Silmons, state geologist, testified: "The road from Burlington \* \* \* is a rolling road all the way. It is gravelled, newly gravelled about a year ago. \* \* \* The road before to being surfaced was mostly rutted, and saw to that side from shoulder to shoulder, and had been gravelled practically all the way and had been worked with a motor grader about two days a week. \* \* \* The surface of the road was as hard as could be expected. There was very little loose gravel there. There was a little in the center, but the track was good."

Plaintiff testified that defendant was driving and that defendant at a speed around forty miles per hour. This testified that defendant was driving, "I would have been told to drive like miles per hour." At a point about nine miles from Burlington, said road passes over a hill or crest, where the evidence of an accident occurred and the road beyond the crest of the hill. Defendant did not slacken the speed of the car as it approached the crest of the hill, but on the descent, the car began to slide, ran into a bank at the side of the road and overturned, and plaintiff testified the injuries the said wife is suffering. The injuries to plaintiff were serious and disabling.

among other things, of "a laceration over the right eye, multiple contusions of the body, and \* \* \* a fracture of the sixth cervical vertebra."

It is first contended that the court erred in its rulings on the evidence, in permitting the plaintiff to state conclusions and in effect to give his opinion on matters coming within the domain of expert testimony and in permitting the attending physician to speculate on the condition of plaintiff and the character of his injuries.

Were it not for other errors which require a reversal, it would not be necessary to refer to the rulings on said evidence as no objection is made to the amount of the verdict. Without going into detail we think the assignment of error with reference to the rulings on the evidence is well taken, and that the court should have been more guarded in this connection.

It is next insisted that the court erred in refusing to direct a verdict for defendant at the close of plaintiff's evidence and again at the close of all the evidence, on motions to that effect made by defendant. We are not prepared to hold that the evidence on the part of plaintiff, taken as true, with all the inferences reasonably to be drawn therefrom, does not tend to prove his case. The court therefore did not err in denying said motions.

It is next contended that the verdict of the jury is against the manifest weight of the evidence. In support of this contention, counsel insist that, in keeping with the holding of the supreme court of Wisconsin in O'Shea v. Lavoxy, 175 Wisc. 456, and other cases cited from said court, this court should hold that plaintiff being a gratuitous guest, had no right "to a greater security than that enjoyed by the host or other members of his family. The host simply places the premises which he has to offer at the disposal and enjoyment of his guest, upon equal terms of security." In other words, it is contended that the laws of the

about other things, or "in connection with the other things," and  
concerning all the things, and "in connection with the other things,"  
verdicts.

It is first contended that the verdict given in the verdict  
on the evidence, in particular the finding in regard to the  
and in effect to give him a verdict on matters which are  
domain of expert testimony and in particular the testimony of the  
to operate on the condition of liability and the liability of the  
injuries.

There is not the other error which relates to a verdict,  
it would not be necessary to take it to the jury on all questions  
as no objection is made to the verdict of the jury. The jury  
into detail as to the testimony of other witnesses in the  
evidence on the evidence is well known, and that the jury should  
have been more careful in this connection.

It is next insisted that the verdict given in the verdict is  
itself a verdict. The defendant of the case of liability is  
and each of the cases of the evidence, as well as the fact  
effect made by defendant. The one and proposed to take the  
evidence on the part of liability, taken as such, with all the  
inference reasonably to be taken therefrom, does not seem to have  
his case. The jury therefore all the evidence in the case is  
It is next contended that the verdict of the jury is

against the verdict of the evidence. In support of this  
contention, counsel stated that, in looking at the finding of the  
expressed about of liability in United v. Jones, 175 Mass. 444, and  
other cases cited from that court, this court would find that  
liability being a question of fact, and as such to be decided  
entirely by the jury, and as such to be decided by the jury  
itself. The fact of liability being a question of fact, and as such  
to be decided by the jury, and as such to be decided by the jury  
itself. It is contended that the verdict of the



state of Wisconsin should govern in the decisions of this case.

Even if the holding of the Wisconsin courts should govern in a case of this character, the proper foundation therefor was not laid, as the laws of Wisconsin were not pleaded, and were not offered in evidence.

It is also insisted that the evidence falls to prove ordinary care on the part of the plaintiff. Plaintiff testified:

"There was a gravel road with loose pebbles and rocks on top, about 20 or 25 feet wide with ditches on either side. The car was being driven between 40 and 45 miles per hour. I told her that there was not the least assurance of safety driving that fast over that kind of a road. She did not answer. We were then about 500 or 600 feet from the place of the accident, going over a hill where we could not see the road ahead. After we got started going down the hill, I saw a car ahead on the road and did not say anything. The car was from one to two blocks ahead \* \* \* The car began to swerve from one side of the road to the other. I told her to take her feet off the pedals and let it go. She screamed. She did not take her feet off the pedals. The car turned and went sideways directly into a bank and turned over on its left side." On cross examination, he testified: "I did not say anything to my sister until the car started swerving, after viewing the car in the road ahead of us. \* \* \* She had both feet on the pedals when I noticed her at that time. I took it for granted at the time the car started swerving that she had pushed the clutch and the brake in. The road was dry and all graveled road. I had not noticed anything unusual up to the time the car commenced to swerve other than the fact that the speed was too fast for that kind of a road in my mind. \* \* \* The road from Darlington was more or less rolling. I think possibly she had maintained a speed of right around 40 miles an hour from the time she left Darlington."

State of Wisconsin records in the hands of this man.

Even if the finding of the Wisconsin records

govern in a case of this character, the present Commission however was not laid, as the issue of Wisconsin was not raised, and was not offered in evidence.

It is also indicated that the evidence fails to prove ordinary care on the part of the plaintiff. Plaintiff testified:

"There was a gravel road with loose gravel and

looks on top, about 20 or 25 feet wide with gravel on either side.

The car was being driven between 20 and 25 miles per hour. I told

her that there was not the least appearance of gravel on the road

last over last kind of a road. The old gravel road. We went from

about 500 or 600 feet from the front of the accident, going over a

hill where we could not see the road ahead. After we got started

going down the hill, I saw a car ahead on the road and did not say

anything. The car was from one to two blocks ahead."

On cross examination, he testified: "I did not say anything to my

to take her fast off the reins and let it go. The emergency. The

did not say she did not see the pedals. The car turned and went

slightly into a bank and turned over on its left side."

On cross examination, he testified: "I did not say anything to my

slater until the car started moving, after which the car is the

road ahead of us. \* \* \* The car was not on the pedals when I noticed

her at that time. I don't know whether at the time the car started

swerving that she had turned her wheels and the pedals in. The road

was dry and all gravel road. I did not notice anything unusual

up to the time she was supposed to swerve after that the first time

the speed was too fast that was kind of a road in my mind."

The road from Lexington was more or less winding. I think possibly

she had maintained a speed of about twenty or thirty miles per hour

the time she left Lexington."

Mrs. White testified: "I did not hear any conversation between my brother and sister, other than brother told her she was driving too fast for any assurance of safety, over soft gravel roads. He told her only once. I did not hear her say anything. She did not slow down. She was still going at a high speed, around, I should judge, between 40 and 45 miles an hour. After we reached the top of the hill I told her there was a car down in front of us. I do not remember her saying anything. \* \* \* She had her foot on the brakes or clutch, in trying to stop the car, and the car was swaying from one side of the road to the other, and my brother told her to let the car go, and repeatedly told her to take her feet off and let the car go."

It was for the jury to say whether plaintiff, just prior to and at the time of said injury, was in the exercise of ordinary care for his own safety.

It is also insisted that there is no sufficient proof that defendant was guilty of the negligence charged; that the fact that she was driving at from forty to forty-five miles per hour is not shown to be negligence, and that, even if defendant did release the clutch and apply the brake, there is no evidence to the effect that so doing was improper or negligent. This point we think is well taken.

It is next insisted that the court erred in the giving of the second and third instructions given on behalf of plaintiff. As to the second instruction, it is contended that it was improper for the court to detail the different elements that the jury should take into consideration in determining whether or not the defendant was guilty of negligence. This point is well taken, and the court erred in giving said instruction. Panekner v. Wakem, 231 Ill. 226; C. & A. Ry Co. v. Anderson, 166 Ill. 572; Wood v. Olson, 117 App. 128.

Instruction number three is as follows:





"The court further instructs the jury that in ascertaining whether the plaintiff exercised that degree of care for his own safety that an ordinarily prudent person would have exercised under the same or similar circumstances, you should take into consideration what, if anything, he did or said to the defendant immediately upon his becoming aware of any impending danger, and it was not incumbent upon him to take or endeavor to take the defendant's seat and steer or operate the car in her place and stead." This instruction is argumentative, misleading and invaded the province of the jury, and the court erred in giving the same.

It is also insisted that the only charge of negligence is the driving of said automobile at an excessive rate of speed. The charge is that "Said Eileen Carrott then and there so carelessly, negligently and improperly drove and operated said automobile at a high rate of speed, to-wit, upwards of forty miles an hour, that it then and there began to slew and skid," etc. If the declaration had omitted the speed of the car, it would have been a sufficient general charge of negligence. The declaration was not demurred to, and while the overruling of a motion in arrest of judgment is noted, that motion is not set forth in the abstract. Defendant is not now in a position to urge the insufficiency of the declaration. It might be further observed that there was no objection that the evidence offered by the plaintiff was not admissible under the pleadings, or that there was a variance between the allegations and the evidence. Counsel are therefore not in a position to urge this assignment of error at this time. Libby, McNeill & Libby v Scherman, 146 Ill. 540-549; Carney v. Marquette Coal Mining Co., 260 Ill. 220-225.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.





STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in

and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of  
said Appellate Court, at Ottawa, this \_\_\_\_\_ day of  
\_\_\_\_\_ in the year of our Lord one thousand  
nine hundred and twenty \_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



6963 250 I.A. 665<sup>3</sup>

General No. 8089, Consolidated with  
General No. 8094                      Agenda Nos. 23 and 28

In the Matter of the Estate of Mary M. Thrush.....  
Petition of Verna B. Edwards and Imo E. Sackett,  
Appellants.

vs.

Edith Lane, Executrix, etc., Appellee.

Appeal from McLean.

NIEHAUS, J.

The cases designated by the General Numbers above stated relate to the same controversy and the same subject matter is involved in the respective appeals; and they are therefore consolidated.

General No. 8094 is an appeal from an order of the circuit court of McLean county, dismissing the petition of the appellants, Verna Edwards and Imo Sackett, filed against Edith Lane, the appellee, as executrix of the Estate of Mary Margaret Thrush deceased, for the removal of the appellee as such executrix and for revocation of the letters of executorship issued to her by the county court of McLean county. The substantial cause averred, for the removal of the appellee as executrix is that "the time for the payment of claims and settlement of the estate has long since expired, and there is nothing to prevent the settlement of said estate; that therefore the said Edith Lane should be cited to appear before the court to show cause, if any she has, why a final report should not be made; and why she should not be discharged as executrix of said estate." It is also averred, that she has shown a lack of interest in the preservation of the estate and a "disposition to seek advantages to herself and her husband, in disregard of the interest of the estate and the interests of the petitioners; all of which had





caused a waste and mismanagement, which, together with a failure to make a final report, should justify the removal of such executrix." The petition was thereafter amended by leave of court, by adding as a distinct additional cause for the removal of the executrix, that she had been guilty of waste and mismanagement; and because of an announced intention on the part of the executrix "to involve the estate in further unnecessary litigation as set forth in the answer of said executrix filed in said petition aforesaid."

General No. 8089 is an appeal by Edith Lane, as executrix, from an order of the court, denying her motion for a modification of certain findings of the court in the order dismissing the petition of the appellants, after the order had been entered by the court.

There are a number of averments in the petition for removal of the executrix and some evidence adduced to prove various matters which have no bearing upon the substantial or statutory grounds alleged as a cause for a removal of the executrix, which are the failure to make a final report and settlement of the estate and waste and mismanagement thereof. The question presented for determination on appeal is, whether there was sufficient proof to show, that the appellee as executrix had been guilty of either or both of these alleged breaches of her statutory duties as executrix. We shall consider these matters in the order mentioned. The executrix in justification of her failure to make a final report and settlement sets forth in her answer to the petition, that the estate had been involved in litigation; and that some of the suits involving the assets and property of the estate had been commenced and prosecuted by the appellants; that one suit for the construction of the will of Mary Margaret Thrush deceased, had been instituted by her in the circuit court, after her appointment as executrix; and that some of these suits were not yet finally disposed of; and that therefore, she had not been in position to make a final report; nor make





distribution of the legacies to the appellants provided for by the last will of the deceased testatrix. The proofs apparently sustain these averments in her answer. The executrix as a part of her answer also makes a report of the financial condition of the estate which is a verified statement of financial condition of the estate and the receipts and expenditures involved in her administration of the estate as executrix since her appointment. The report shows, that the total amount received by her was \$600.00; and that the total amount expended was \$424.07; and that she has a balance on hand of \$175.93. The correctness of this report was not questioned on the hearing in the court below. The answer also avers, and the proofs show, that the other property of the estate, inventoried by the executrix and which is involved in this controversy namely two promissory notes of ~~\$500.00~~<sup>\$600.00</sup> each, secured by mortgage, which are claimed by the appellants as legacy to them under the last will of the deceased testatrix, and which were the subject matter of other controversies between the parties, were impounded with the clerk of the circuit court of McLean county by agreement of the parties hereto; and are now in possession of the circuit clerk pending the final determination of the litigation in the circuit court. In view of this state of the record, concerning these mortgage notes and the disposition thereof by the parties, we are of opinion that the court properly drew the inference that the estate was all intact and accounted for; and that no part of the same had been wasted or misappropriated or mismanaged by the executrix. It is also apparent, that on account of the litigation in which the estate has become involved, some of which is still pending and undetermined, that the executrix has not been, and was not at the time appellants' petition was filed, in position to make a final report and settlement of the estate; nor to pay over to appellants the legacies in question; and the court therefore, did not err in entering the order dismissing appellants' petition; but we are also of opinion, that inasmuch as the court determined that the appellee had shown sufficient cause, why she should not be removed,



and dismissed the petition, there was nothing more before the court for determination. The question of the merits of the bill filed by the appellee as executrix to construe the will of the deceased could not properly be determined by the court in this proceeding; nor was it incumbent on the Court in this state of the record to find what amount of commissions or compensation the executrix was or not entitled to, for her services; nor what credits she should be allowed for attorneys fees in defending the suits involving her as executrix of the estate; these matters, and all matters which pertain to a subsequent accounting, or a final accounting in the estate or a final settlement of the estate, are for the future determination of the county court; and all the findings and directions made in connection with the order of dismissal are therefore reversed; but the order dismissing the petition to show cause is affirmed.

Concerning the appeal by the executrix pending in General No. 8089, it may be pointed out, that this appeal was from the order of the court denying the motion to modify certain parts of the order of dismissal of the petition for the removal of the executrix; and it is evident, that this appeal is not from the order, but from the refusal of the court to modify a part of the order. An appeal cannot be taken from a part only of a judgment, order or decree, unless there is a statute permitting it. 3 Corpus Juris p. 466, sec. 286. Moreover, the denial of the motion does not contain the essential elements of a final judgment or order from which an appeal may be prosecuted. **City of Alton v. Heidrick** 248 Ill. 79.

For the reason stated, the appeal in case General No. 8089 is dismissed.





and dismissed the petition, there was nothing more before the court for determination. The question of the merits of the bill filed by the appellee as executrix to construe the will of the deceased could not properly be determined by the court in this proceeding; nor was it incumbent on the Court in this state of the record to find what amount of commissions or compensation the executrix was or not entitled to, for her services; nor what credits she should be allowed for attorneys fees in defending the suits involving her as executrix of the estate; these matters, and all matters which pertain to a subsequent accounting, or a final accounting in the estate or a final settlement of the estate, are for the future determination of the county court; and all the findings and directions made in connection with the order of dismissal are therefore reversed; but the order dismissing the petition to show cause is affirmed.

Concerning the appeal by the executrix pending in General No. 8089, it may be pointed out, that this appeal was from the order of the court denying the motion to modify certain parts of the order of dismissal of the petition for the removal of the executrix; and it is evident, that this appeal is not from the order, but from the refusal of the court to modify a part of the order. An appeal cannot be taken from a part only of a judgment, order or decree, unless there is a statute permitting it. 3 Corpus Juris p. 466, sec. 286. Moreover, the denial of the motion does not contain the essential elements of a final judgment or order from which an appeal may be prosecuted. **City of Alton v. Heidrick** 248 Ill. 79.

For the reason stated, the appeal in case General No. 8089 is dismissed.





6964a

250 I.A. 665<sup>4</sup>

General No. 8123

Agenda No. 51

OCTOBER TERM, A, D. 1927

The People of the State of Illinois,  
Defendants in Error,

vs.

George Finley, Plaintiff in Error.

Writ of Error to the Circuit Court of Montgomery  
County.

ELDREDGE, J.

Plaintiff in error was convicted in the Circuit Court of Montgomery County upon an indictment charging him with unlawfully transporting intoxicating liquor and sentenced him to confinement in the Illinois State Farm at Vandalia, Illinois, for a period of one hundred and twenty days. The only error presented to this court for consideration, is that the verdict was contrary to the evidence. It appears that several deputy sheriffs, pursuant to a search warrant, went to a place where plaintiff in error and one Fred Brown resided. While they were there plaintiff in error drove into the yard in an automobile and when he saw the deputy sheriffs, who told him they had a search warrant, reached to the back seat of the car and attempted to grab a hammer which was there and missed it. On the bottom of the car at his feet was a gallon jug in a gunney sack and one of the deputy sheriffs reached up and tried to take it when plaintiff in error rolled over on top of the jug and a scuffle ensued between them over the possession of the jug.



Plaintiff in error finally rose up with the jug in his arms and threw it out on the left side of the car, striking the windshield and breaking the jug into pieces. The contents spilled all over the ground and soaked the gunney sack, causing a strong smell of alcoholic liquor. Plaintiff in error stated "Don't care; you can save it if you want to ; it is coal oil." Also "I don't give a damn now; you have not got anything to show for it." Also: "There goes your damned evidence; you have not got anything on me now."

The defendant offered no evidence and there is no direct evidence that the liquor in the jug contained more than one-half of one percent of alcohol, or that it was suitable for beverage purposes. The rules of evidence pertaining to violations of the prohibition act are no other or different than those applicable to violations of the other criminal laws of the state. If the jury believed beyond a reasonable doubt, from the evidence of what plaintiff did and said, that he was guilty of the crime charged then its verdict was justified. The evidence shows, beyond a reasonable doubt, that the liquor in the jug contained alcohol in such quantity as to give forth a very strong odor which was evidence tending to show that it contained more than one-half of one percent thereof. If it had not





been fit for beverage purposes it would not have been necessary for the plaintiff in error to have destroyed it. Considering all the evidence including his words and actions, we cannot say that the offense was not proven by the evidence beyond a reasonable doubt. This conclusion is more or less supported by the case of **People vs. Berglin**, 309 Ill. 488.

The judgment is affirmed.





6965a

250 I.A. 665<sup>5</sup>

General No. 8140

Agenda No. 14

Leon Chevillon Company, Appellant.

vs.

Ida Murphy, Administratrix of the Estate of Thomas

B. Murphy, Deceased, Appellee.

Appeal from McDonough.

NIEHAUS, J.

In this case a judgment by confession was entered in the circuit court of McDonough county on Nov. 6, 1925, in favor of the appellant, Leon Chevillon Company and against Thomas B. Murphy, for the sum of \$2531.78, on a promissory note and warrant of attorney given to appellant, by Murphy. The promissory note in question recites on its face that it was given for the purchase price of an 18—30 No. 6172 Allis Chalmer Tractor, No. 5—3 Bottom Tractor Plow and No. BT 1016 Pony Engine Disc. The note and warrant of attorney referred to are in words and figures as follows:

\$2000.00

Carthage, Illinois, Mch 10, 1921.

On or before the first day of March 1922, I, (We), for value received, promise to pay to the order of Leon Chevillon Company, (Inc.) the sum of Two Thousand and no-100 Dollars with interest thereon from date at the rate of seven per centum per annum; payable at Carthage, Illinois. This note represents the purchase price of 18—30 No. 6172 Allis Chalmer No. 5—3 bottom tractor plow No. B. T. 1016 Pony Engine Disc, and it is expressly understood and agreed by and between the maker or makers of this note and said payee herein, that the title, ownership and right to immediate possession of said goods and merchandise does not pass from said payee until this note, with all interest due thereon, shall have been fully paid; and that the said payee, or its assigns shall and does have the right, power and



authority to declare this note due, and retake the said goods and merchandise at any time hereafter, anything herein to the contrary notwithstanding.

And to secure the payment of this note, and the interest to accrue thereon, the maker or makers hereof, do hereby, irrevocably, authorize any attorney of any Court of Record, to appear for him or them in such court, in term time or in vacation, at any time hereafter, and confess a judgment without process in favor of the holder of this note for such amount as may appear to be unpaid thereon, together with costs, and a sum of money equal to ten per centum of such amount as may appear to be due thereon, as attorney's fees; said attorney's fees to be included in any judgment the court may render against the maker or makers of this note for the amount due thereon; and to waive and release all errors which may intervene in any such proceedings, and to consent to the issuance of immediate execution upon such judgment, hereby ratifying and confirming all that said attorney may do by virtue hereof. The maker or makers endorsers and guarantors of this note hereby waive demand, notice of nonpayment and protest.

Thomas B. Murphy (SEAL)

Carthage, Ill.

On the 1st day of December 1925, Thomas B. Murphy died intestate; and letters of administration were issued to the appellee, Ida P. Murphy, who thereupon petitioned the court as administratrix of Thomas B. Murphy's estate to open the judgment and give her leave to plead in defense of appellant's right to recover on the note. Leave was given by the court; and the appellee thereupon pleaded the general issue; also, a special plea embodying an affirmative defense to the judgment note. The facts which constitute this defense are set up in the special plea filed as follows: "That the plaintiff came upon the premises of said Thomas B. Murphy, this defendant's decedent, and then and there took the tractor, plow and disc described in said note, and converted the same to its





own use, and repossessed itself absolutely of the said described tractor, plow and disc, and took said property in full and complete satisfaction and discharge of the said several promises and of all the sums of money in said declaration mentioned." Issue was joined on this plea; and the facts alleged in the plea constitute the controverted question of fact in the case. It is elementary, that inasmuch as the appellee alleged an affirmative defense it was enucumbent upon her to establish such defense. In the trial by the court, the court found the issues in favor of the appellee, and entered an order vacating and setting aside the judgment, which had been entered by confession; this appeal is prosecuted from this order and judgment of the court.

The record of the evidence discloses the following facts in reference to the issue involved in the controversy. That the deceased Thomas B. Murphy on March 10, 1921, purchased from the appellant certain farm machinery consisting of a tractor, plow and disc, for the sum of \$2588.11; and that he gave the appellant two promissory notes for the amount of the purchase price; one note for \$588.11, drawing interest from date at the rate of 7 percent per annum, and due on or before Sept. 1st, 1921; and another note for \$2000.00, drawing





interest from date at the rate of 7 percent per annum and due on or before March 1st, 1922. A warrant of attorney authorizing the confessing of a judgment was attached to each of these notes. The farm machinery was thereupon delivered to Murphy and he used it extensively for about two years in farm work on his farm of 240 acres; Murphy did not pay anything on the notes given for the machinery; but after both notes had become due and remained unpaid, he returned the farm machinery to the appellant in the spring of 1923; and the appellant took possession of it at that time; repaired it and put it in proper order for sale and then sold it for \$1072.00. The price obtained therefor, the evidence shows, was the fair cash market value of the machinery at the time of its sale in the condition that it was in. The amount realized from the sale of the machinery was credited by the appellant on the two notes given by Murphy; and the smaller note for \$588.11 with the interest due thereon was liquidated thereby; and the balance remaining, was credited on the amount due on the \$2000.00 note. The judgment taken on the \$2000.00 note represents the amount of the principal and interest due on that note, less the credit and the attorney's fees provided for in the warrant of attorney.

The vital question which arises from this controversy is, whether or not the evidence sustains the issue of fact raised



by the special plea, in averring that the appellant repossessed itself of the tractor, plow and disc in question for which the note was given, and took them in satisfaction of the indebtedness represented by the note. The appellee offered no evidence to sustain her plea; but the appellant called D. L. Latham as a witness to testify concerning this feature of the case. Latham testified, that he was a traveling adjuster for the Deere Plow Co. in the fall of 1925; and that he went with Fred Chevillon, the representative of the appellant, to the house of Thomas B. Murphy, who at that time was living in Bushnell, to see about the collection of Murphy's indebtedness on the notes in question, and that he had the notes with him at the time. Latham was asked, to state the conversation as nearly as he could, and his answer was as follows: "After I was introduced or introduced myself, like that I was with the Deere Plow Co., and had went over to Carthage in their behalf to get the Chevillon people to pay some money that they owed John Deere Plow Co., and that the John Deere people had given me his paper, I think it is the words I used, I am stating the conversation with him. The John Deere Plow Co. had given me some paper or his notes, and he says, yes, yes, he says, I know I owe the Chevillon people a lot of money, and I want to pay it, he says, I am honest, and would pay it if I could see my way to do it; but, he says, here I am a sick man, he says, and





I don't see any way that I will ever be able to pay it. He says, I want to, and if I live long enough and get to where I can, I will, I believe I asked him if he knew about how much he was owing; or perhaps I called his attention, that the notes were then and there four years old; I don't recall which; I think they were given in 1921 in March, or somewhere along there. I recall it was considerable interest; and he says, yes, he says, here is a note with no endorsements, yes, but, he says, I got some credit coming on that for some goods they took back, that I gave them back, or something; but that he was honest, and he knew he owed them a lot of money and he wanted to pay it."

The testimony of Latham is the only witness in the case which definitely shows how the appellant became repossessed of the farm machinery in question, and Murphy's understanding with appellant concerning the return of the property back to the appellant; and the fact appears to be established by this testimony, that Murphy turned back the machinery to the appellant, and was to get credit to the extent of its value on the amount of his indebtedness on the notes he had given to appellant. There is no proof in the case contradicting the evidence of Latham; and this evidence may therefore be regarded as conclusive proof of the fact that the appellant did not repossess itself and take back the property in question in full and complete satisfaction





of the notes as alleged in the plea, but took it back with the understanding, that Murphy should be given credit for the amount of the value thereof on his notes. In this state of the record, we conclude that the court was in error in finding the issues for the appellee; and in vacating the judgment in question. The order of the court vacating the judgment is therefore reversed and the cause remanded with directions to enter an order that the judgment stand as originally rendered.

Reversed and remanded.



6888

250 I.A. 666'

General No. 8183

Agenda No. 13

OCTOBER TERM, A. D. 1927

George W. Farley, Appellee, ✓

vs.

James H. Lanham et al., Appellants. ✓

Appeal from the Circuit Court of Sangamon County  
SHURTLEFF, P. J.

This is a suit in equity in which appellee filed his bill of complaint for specific performance of two contracts in writing, and additional verbal agreements in connection therewith, against James H. Lanham, one of the appellants, to the September Term, 1919, of the Circuit Court of Sangamon County. The bill charged that appellee and appellant, on September 19, 1918, entered into the following written contract:

Springfield, Ill., Sept. 19, 1918

"This agreement made between J. H. Lanham and George Farley, witnesseth, that said Lanham is to trade property located at 116 W. Carpenter Street and Lots Nine (9) and Ten (10), Mt. Pleasant Addition to the City of Springfield, Sangamon County, Illinois, valuation Ten Thousand Dollars (\$10,000) for all. Farley is to trade his farm of Three Hundred and Six (306) acres in Saline County, Illinois, valuation Fifty (\$50) Dollars per acre. It is understood that L. H. Coleman has a mortgage on said farm, amount Five Thousand Dollars (\$5,000.00) which Farley is to reduce to Four Thousand Dollars (\$4,000.00) and then he is to carry the balance due on a second mortgage at six per cent for five years. It is agreed that Lanham shall not be in default until two years interest is due and unpaid on second mortgage. Each party is to pay all taxes and special assessments against their respective





properties due on January 1, 1919. This trade is to be closed up January 1, 1919. Lanham agrees to pay One Thousand Dollars' (\$1,000.00) in cash on January 1, 1919 and the mortgage is to be reduced to that amount. Each party agrees to put up a forfeit of \$250.00 in the hands of Louis Coleman to bind this trade provided said Coleman will take the mortgage for \$4,000.00 on the Farley farm.

"This conveys surface of farm only, mining privileges reserved.

J. H. LANHAM

GEO. FARLEY

"Lanham agrees to pay the interest on Coleman mortgage from October 1, 1918 to January 1, 1919 and Lanham is to receive the rents from his properties due up to January 1, 1919, and in addition Lanham is to pay interest on the other money due Farley from October 1 to January 1, 1919."

On December 26, 1918, they entered into another agreement in writing as follows:

"Springfield, Ill., Dec. 26th, 1918

"This agreement witnesseth that George W. Farley is to deliver to J. H. Lanham the warranty deed made by him for the 305 acres of land in Saline county, Illinois, and now held by John Barber. The said J. H. Lanham is to deliver deeds held by John Barber to George Farley when Farley secures possession of a certain quit claim deed made to the 305 acres of land in Saline County, Illinois signed by Charles Stahl and wife, and Z. T. Taylor, when this is done Farley is to deliver the quit claim deed to J. H. Lanham; when this is done J. H. Lanham is to pay \$750.00 in cash and make a mortgage on said land for \$5,000.00, coal, oil and mineral rights reserved. The deeds held by Barber to be delivered to Farley are for Lots 9 and 10 Mt. Pleasant Addition and Lot 3 of Mason's Addition, Springfield, Illinois. Subject to abstract inspection."

J. H. Lanham

Geo. W. Farley





The bill further alleges that other verbal agreements were had between the parties in which the mortgage held by L. H. Coleman was to be paid in full and another mortgage for five thousand dollars given to Farley for five years, with interest at six per cent.; that the appellant James H. Lanham should deed to appellee the property in the City of Springfield, subject to mortgages of thirty-five hundred dollars, payable five years from October 10, 1918, and that the exchange of said property should take place on January 1, 1919; that in compliance with the agreements appellee made a deed to the farm land and conveyed all his rights in said property to James H. Lanham, but that he did not receive the deeds to the property located in the City of Springfield, neither were the abstracts covering said property brought down to January 1, 1919; that the thirty-five hundred dollar mortgage made on the city property by the appellant James H. Lanham was not for a period of five years, but for only one year; that the five thousand dollar mortgage did not cover the whole land deed to the appellant James H. Lanham; and did not bear six per cent interest; that said mortgage and notes were to be turned over to appellee, but that the mortgage was recorded by some party unknown to the appellee, without appellee's consent, knowledge or inspection.

The bill further charges that the appellant James H. Lanham was still collecting the rentals on the city properties, and that the said Lanham was endeavoring to sell the farm land in Saline county theretofore conveyed to him by the appellee; that James H. Lanham did not comply with all the agreements and contracts entered into by the parties with reference to the transfer of the land and real estate in the City of Springfield, and that the appellee, George W. Farley, insisted that James H. Lanham account for the rentals collected upon the Springfield property.



The bill prayed that James H. Lanham ought to be restrained by the injunction of the Circuit Court from collecting and receiving the rentals, and from disposing, transferring and conveying the farm land, as described in the deeds, until an adjustment was made by the court of the rights of the appellee, and until the deeds to the property located in the City of Springfield were properly executed and delivered to him, subject to a mortgage of thirty-five hundred dollars, payable five years from October 10, 1918; that an accounting be made of the rentals of the properties located in Springfield, and that James H. Lanham be ordered to make proper deeds to the same; that a note in the sum of five thousand dollars secured by a mortgage for a period of five years on the whole farm land described in said deeds, bearing interest at the rate of six per cent per annum, be given to appellee, and prayed process.

Appellant James H. Lanham filed an answer admitting that he was seized in fee of the lands in the City of Springfield, described in the bill, but averred that a certain mortgage was outstanding against said lands and that a judgment against appellant was outstanding, which was a lien against said lands. Appellant admitted making said contracts, as averred in the bill, but alleged that appellee's tract of land was valued at fifty dollars an acre instead of fifty-two dollars an acre, and that said contract had in it no reservation of mining privileges or any clause limiting the parcel to be transferred to the surface only. The answer admitted the making of certain verbal agreements between the parties, and alleged that said verbal agreements were executed by both parties; but the answer denied that the verbal agreements were as set forth by words and figures in the bill and in this respect alleged that Appellant Lanham was to mortgage the city property for four thousand dollars for a term of one year and not for thirty-five hundred dollars, as alleged, and that appellant was to execute a mortgage on the larger tract of the farm for five





thousand dollars at five per cent. interest per annum for five years.

The answer further charges that the appellant James H. Lanham did mortgage the city property for four thousand dollars for one year, but reserved the privilege of having said mortgage extended for two years longer; that J. J. Wyatt of Ashland, Illinois, has a prior mortgage for thirty-five hundred dollars, and that a second mortgage for five hundred dollars was executed and delivered to Franklin Lanham for one year.

The answer charges that Louis Coleman represented Appellee Farley as his attorney throughout the transaction between the parties, and that the money derived from the mortgages on the city property was paid to Coleman for the purpose of satisfying his mortgage on the tract of land owned by appellee; that the said James H. Lanham, appellant, executed and delivered to said attorney for Farley deeds on said city property, subject to the aforesaid mortgages; that Appellee Farley executed a deed for said farm for the appellant; that the same was delivered to Louis Coleman, his attorney, for delivery to the appellant and that the deed was delivered and placed on record in Saline County, Illinois; that said appellant James H. Lanham in turn, and in compliance with the verbal agreements and contracts in writing, delivered to Coleman for appellee a first mortgage on the larger tract of land in Saline County, Illinois, for five thousand dollars, at five per cent. interest, for a term of five years, which mortgage was placed of record in Saline County, Illinois; that the deeds and mortgages were made in compliance with the agreements, and that abstracts of title were brought down to date and delivered to the appellee.

The answer also avers that the appellee may obtain possession of the premises which were conveyed to him by Appellant James H. Lanham, and that the said appellant had been and is collecting the rentals and profits of said premises from the time of said agreement, and is doing so solely by reason of appellee's verbal





request and an order in writing to him from the appellee; that appellee never asked for an accounting of said rentals, and that the interest on all said mortgages to be paid by appellee had been paid by said Appellant James H. Lanham out of the rentals and profits, as may be seen by an account attached to his answer.

The answer avers that all deeds, mortgages and abstracts of title in proper form were executed and delivered as provided by all of said contracts, and that said appellant James H. Lanham had complied with all said agreements; that he is not about to sell the farm conveyed to him, nor does he insist on collecting rentals on the city property, but desires that appellee take charge of said property as he is in duty bound to do; that the interest due from him to appellee on the mortgage on the farm land in Saline County, Illinois, has been deposited in the Illinois National Bank at Springfield, Illinois, to the appellee's account; that the notes secured by said mortgage are in possession of Louis Coleman as attorney for appellee; and that he has attached to his answer what he termed a true statement covering rentals and charges on the city property.

Appellee filed his general replication. The cause was referred to the master in chancery upon the original bill, answer and replication. The master heard the proofs and presented his report of his conclusions of law and fact in said cause, to which objections were made by Appellant James H. Lanham and later, by stipulation, the objections became exceptions before the chancellor. The exceptions were heard and overruled and said cause was referred back to the master for an accounting. Additional testimony was taken before the master upon the question of collection of rentals and expenditures upon the Springfield city property. Certain facts being disclosed in regard to transferring the farm land in Saline County by Appellant James H. Lanham to his father, J. E. Lanham, the appellee obtained leave of the court to amend the original bill, making J. E. Lanham, Walter A. Durham and the Big Creek Coals Inc., a



corporation, parties defendant, and the amendment was filed October 13, 1926.

In addition to the allegations in the original bill, it was charged that James H. Lanham, appellant, conveyed title to the Saline County land to Appellant J. E. Lanham, and that the said J. E. Lanham and Rosa B. Lanham, his wife, entered into a lease covering the coal rights to said land with Walter A. Durham, who in turn assigned the lease to the Big Creek Coals Inc., a corporation. Said amended bill asked that the deed from James H. Lanham to J. E. Lanham be declared null and void, and for a finding that it was made for the purpose of obstructing the rights, title and interest of said appellee in said coal rights, and to minimize the securities given to him on the said five thousand dollar mortgage, and asked that the leases above named be declared null and void, and that the said James H. Lanham and J. E. Lanham, appellants, shall give an accounting for all the moneys they collected and received from the said coal company under said coal lease.

An answer was filed by the appellant Walter A. Durham and the Big Creek Coals Inc., a corporation, and testimony was taken covering the payments made by the coal company to J. E. Lanham under said lease. Later, on May 16, 1927, the appellant J. E. Lanham filed his answer in which he claims that he took the title to said land for a good and valuable consideration, and that he had no knowledge of any controversy between the appellee and James H. Lanham. He admitted leasing the coal rights to Walter A. Durham, and denies that appellee was entitled to the relief asked in his amended bill. Replication was filed to said answer. Evidence was heard before the master upon the amended bill and the answers thereto. No testimony was offered by the appellant J. E. Lanham in support of his answer.

Thereafter the master filed his additional report of conclusions of law and fact upon the evidence taken on the accounting and upon the evidence covering the allegations in the amendment to the





bill, and the answers thereto, The appellants James H. Lanham and J. E. Lanham filed their objections before the master, which were overruled and were made exceptions before the chancellor. The exceptions to the supplemental report and the report theretofore filed were argued before the chancellor and were overruled, and a decree entered.

The master found and the court decreed that it had jurisdiction of the subject matter of the bill and all parties thereto, and that the contracts entered into between the appellee and the appellant **James H. Lanham** were valid agreements which, when construed as a whole, obligated appellee to convey to Appellant James H. Lanham, with coal, oil and mineral rights reserved, the 305 acres of land in Saline County, formerly owned by said appellee, and that said appellant James H. Lanham became obligated to convey to appellee the real estate in Springfield, Illinois, formerly owned by him; that Appellant James H. Lanham should pay to appellee the sum of five thousand dollars, being the mortgage lien upon said farm in Saline County, together with interest accrued thereon from the date of its making, and the properties in the City of Springfield should be turned over to appellee clear of any encumbrances except those placed thereon by the appellee himself; that the deed between the appellants James H. Lanham and J. E. Lanham was declared null and void and Appellant James H. Lanham was ordered to make a deed for the coal rights to appellee; that he pay appellee the sum of seven hundred and fifty dollars and interest thereon and the sum of one hundred twenty dollars for seed wheat; that James H. Lanham should make a sufficient deed of conveyance covering the properties in the City of Springfield formerly owned by him, and that in the accounting of the money received by Appellant James H. Lanham from the Springfield property he was chargeable with the following amounts:

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|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|-------------|
| Rentals collected on Springfield property .....                                                                                                                                                                              | \$ 6,068.00 |             |
| On rentals received from the coal rights the sum of .....                                                                                                                                                                    | 4,362.52    |             |
| Due to appellee for seed wheat .....                                                                                                                                                                                         | 120.00      |             |
| <hr/>                                                                                                                                                                                                                        |             |             |
| Making a total amount chargeable to <b>Appellant</b> James H. Lanham the sum of .....                                                                                                                                        |             | \$10,550.52 |
| The appellant James H. Lanham should have credited for the following:                                                                                                                                                        |             |             |
| For his services rendered as agent for the Springfield properties .....                                                                                                                                                      | \$ 572.60   |             |
| To water and light bills paid by him on said property....                                                                                                                                                                    | 401.91      |             |
| Mortgage lien paid on the Springfield property .....                                                                                                                                                                         | 3,500.00    |             |
| Interest on said mortgage lien .....                                                                                                                                                                                         | 1,107.50    |             |
| Insurance premiums on Springfield property paid by James H. Lanham .....                                                                                                                                                     | 115.20      |             |
| Taxes on Springfield property paid by James H. Lanham .....                                                                                                                                                                  | 1,098.86    |             |
| Repairs made and paid by James H. Lanham .....                                                                                                                                                                               | 702.25      |             |
| <hr/>                                                                                                                                                                                                                        |             |             |
| Making a total credit of ....                                                                                                                                                                                                |             | \$ 7,498.32 |
| Deducting the credits due to Appellant James H. Lanham from the credits due to Appellee George W. Farley, leaves a total net due appellee over all funds collected and handled by Appellant James H. Lanham the sum of ..... |             | \$3,052.20  |

It was also found that Appellee George W. Farley should make a deed to Appellant James H. Lanham for the fifteen acres of land which had been omitted in the original deed. The court also found that Appellant James H. Lanham had been in continuous possession of said fifteen acres, and if the appellee failed to convey by deed the said fifteen acres, the appellant James H. Lanham should be entitled to an additional credit of seven hundred and eighty dollars.

It was further found that the thirty-five hundred dollar mortgage upon the Springfield property had been paid, but that the mortgage had not been released of record. It was also found that J. E. Lanham obtained a deed to the Saline County property from James H. Lanham during the pendency of these proceedings, and that Walter A. Durham and Grace Durham, the Big Creek Coals Inc., a corporation, claim some interest in said coal, and the court found that their interests are subject to the rights of appellee.

The court further found that the deed from James H. Lanham to



J. E. Lanham, father of Appellant James H. Lanham, was made for the purpose of fraudulently obstructing the rights, title and interest of appellee, and **to deprive and defraud him out of the profits of the coal, oil and mineral rights underlying said Saline County, Illinois, land.**

Appellants J. H. Lanham and J. E. Lanham have appealed.

The salient facts, as shown by this record, establish by a preponderance of the evidence that after the first contract was made and the appellee and Appellant James H. Lanham deposited the sum of two hundred and fifty dollars each with Louis Coleman, they learned that Louis Coleman refused to carry the mortgage upon the farm for four thousand dollars, and that Stahl and Taylor, who had the title to the farm land in Saline County as security, insisted in having their equity in said premises paid. The parties entered into a new agreement to conclude their trade. It was decided between them that each one should, in addition to the two hundred and fifty dollars theretofore paid to Coleman, place in his hands the sum of one thousand dollars each, making a total of twenty-five hundred dollars, which was done, and if the contract was not closed by January 1, 1919, the party in default should forfeit to the other his deposit.

On October 24, 1918, appellee left a deed to the Saline County land with John Barber, an attorney in Springfield, who represented Appellant James H. Lanham, to be held until the contract was concluded. Lanham was to make a mortgage to Farley for five thousand dollars on the Saline County land, deeded to him by Farley, and a deed to the coal rights, if not sold, Lanham agreed to raise sufficient funds to pay Coleman his mortgage in full and to pay Stahl and Taylor their equity in the Saline County farm. Being unable to finance the proposition, Lanham requested Farley to allow him to borrow twenty-five hundred dollars on the property situated in the City of Springfield, which he intended to transfer to Farley. Farley agreed to this proposition. Later, James H. Lanham instead of putting a mortgage of twenty-five hundred dollars on the city





property, raised the sum of thirty-five hundred dollars, for which he gave a mortgage, and paid Coleman, Stahl and Taylor their claims against the Saline County farm. The twelve hundred and fifty dollars deposited by appellee, George W. Farley, was never returned to him.

The testimony shows that shortly after January 1, 1919, a meeting was held in the office of John Barber, the attorney for Appellant James H. Lanham, at which time Z. T. Taylor, Lanham and Appellee Farley were present. Farley claimed that Lanham owed him fifteen hundred dollars, and that papers should not be turned over to Lanham until that money was paid. Lanham proposed to give a note to Farley for said amount but Farley refused to take the note. Subsequently thereto, without the knowledge or consent of appellee, he learned that the deed that he left in Barber's office was placed of record in Saline County as well as a mortgage made to him by James H. Lanham, which mortgage and note were never presented to him. Several conferences took place between the appellant James H. Lanham and the appellee.

During the negotiations and prior to the contract of December 26, 1918, the appellant James H. Lanham advised the appellee that if a deed was made to him including the coal rights to the Saline County lands, he could sell the coal rights for the sum of twenty-two dollars per acre net to appellee and it would save them additional expenses in paying taxes during that year. Appellee agreed to this proposition, and advised James H. Lanham that whatever he obtained above the sum of twenty-two dollars per acre was to be his commission. Later, Appellant James H. Lanham informed appellee that he had left a deed to the coal rights with Louis Coleman conveying the same back to him.

Some time during the latter part of January or the first part of February, 1919, Louis Coleman, who represented Stahl and Taylor and was not the attorney for appellee, as Coleman's testimony shows,





brought up a package of papers to James E. Dowling, an attorney in the City of Springfield, and obtained a receipt from Dowling and Farley covering the papers in said package. Upon examining the contents thereof Appellee Farley ascertained for the first time that a mortgage was filed in Saline County for five thousand dollars, covering only part of the 305 acres of land, and that it bore five per cent interest instead of six; that the package did not contain the deed to the coal rights. He was informed that the mortgage on the city property conveyed to him by Lanham was for thirty-five hundred dollars, bearing interest at six per cent per annum, payable one year from date, and, in addition thereto, there was another mortgage for five hundred dollars; that the abstracts to the city property were not brought down to date, the last certificate of the abstracter being on October 12, 1918, and the abstracts did not show the mortgages mentioned. Appellee Farley refused to accept the papers turned over to him by Louis Coleman and wrote on the envelope, "rejected." Several conferences were had between him and the appellant James H. Lanham whereby he endeavored to obtain a settlement from him without any result.

The testimony further shows that Appellant James H. Lanham purported to convey to his father, Appellant J. E. Lanham, the Saline County lands on April 28, 1919, by two deeds, for a purported consideration of one and two dollars respectively; but the deeds were not recorded until August 13th and 26th, 1919, respectively two months after the original bill in this cause was recorded in the office of the Recorder of Deeds in and for Saline County. There was no consideration paid for the transfer from father to son. It was further shown that the son always held himself out as the owner of the Saline County lands, and that the transfer to the father was not known to appellee until the month of October, 1926.

The testimony shows that shortly after appellee refused to accept the papers from Coleman, Otto Dittberner and Appellant



James H. Lanham appeared at the office of James E. Dowling and obtained from him the deeds to the Springfield properties and the mortgage of five thousand dollars given by appellant James H. Lanham to Appellee George W. Farley, as well as the notes covering the same; that later Appellant James H. Lanham took from Otto Dittberner the mortgage and the notes; that appellee has never had the deeds to the city property, neither the mortgage nor the notes which were due him.

The testimony further shows that the mortgage of five hundred dollars upon the city property was paid off by Appellant James H. Lanham, but that the release of the same was not filed of record. A long time after the transaction was at an end, the release was introduced in evidence in this case; that out of the rentals received from the city property Appellant James H. Lanham paid off the mortgage of thirty-five hundred dollars the last installment being paid during the month of January, 1927, but that it was not released of record.

The evidence further shows that Appellant James H. Lanham did not pay the seven hundred and fifty dollars due to appellee and the further sum of one hundred and twenty dollars for seed wheat. The accounting of Appellant James H. Lanham charges appellee six per cent interest, making a total interest charge of \$1646.75 on the thirty-five hundred dollar mortgage up to the time the mortgage was paid off, which appellant's testimony shows that the mortgage was paid off in various payments.

The assignments of error upon this decree raise principally questions of fact.

It is assigned as error that the master and chancellor found and decreed that appellee, in the conveyance of the Saline County lands, was to reserve the coal, oil and mineral rights, and it is charged that appellee wrote this clause in the contract without the knowledge of Appellant James H. Lanham, after the contract





was executed. This contention is not supported by the testimony. Appellee produced a letter written by Appellant James H. Lanham to J. T. Taylor, under date of December 26, 1918, in which appellant stated that appellee was to reserve the coal, oil and mineral rights, and both written contracts so state.

Appellants assign error on the ground that appellee does not come into court with clean hands, he never having carried out his part of the contracts. The basis of this assignment is that appellee gave appellant a conveyance for only two hundred and ninety acres of land when the contract calls for a farm of three hundred six acres. It is insisted that the conveyance is fifteen acres short. At the time this contract was made Stahl and Taylor of Elkhart, in Logan County, held the legal title to the Saline County lands, in fee, in trust to secure the payment of a debt that appellee owed to them. It was agreed between appellee and appellant that Stahl and Taylor should convey direct to Appellant James H. Lanham, upon the payment of their indebtedness, and such a deed was executed under date of October 22, 1918, and later delivered to appellant. This deed describes lands amounting to "about 303 2-3 acres." It is not disputed but that this deed conveyed appellee's entire farm. This deed appellant caused to be recorded in Saline County on January 9, 1919, and appellant from that date has held and claimed to own the entire tract, by virtue of the deed. Later, appellee executed a warranty deed to appellant, but by inadvertence omitted the description of fifteen acres, which has been corrected by the decree. It is sufficient answer to this contention to state that Appellant James H. Lanham by his answer and by his attitude through the entire proceeding has contended that all of the terms of the written and verbal contracts had been fully carried out and executed.

Appellant assigns error on the ground that the court held that appellant had not delivered a deed to appellee of the





Springfield property and had not fully carried out his part of the contract. This assignment is based upon the assumption that Coleman was the agent of appellee and was authorized to do all things necessary to be done for appellee in carrying out the contract. It is based upon the further assumption that Appellant James H. Lanham fully performed his part of the contract. Coleman was not appellee's attorney or agent in any respect. He was appellee's creditor and interested only in collecting his debt from appellee and using the situation to that end. Papers delivered to Coleman did not effect a delivery to appellee. Appellant did deposit a deed or cause one to be left with Coleman, but the abstract was not brought down to date and the conveyance was not made "subject to abstract inspection," in accordance with the terms of the contract. The proofs show that appellant had purposely encumbered the property for four thousand dollars in violation of the contract, and has used the rents, issues and profits of the property during the nine years this cause has remained in the courts, in part to satisfy and pay up his individual indebtedness, which payments have been scattered through the entire period, although the decree charges appellee interest on his own funds for the entire time. Appellant is not injured by the decree in this respect.

It is claimed by appellant that the master and the chancellor have gone outside of the pleadings in requiring Appellant James H. Lanham to account for sixty bushels of seed wheat which appellee had upon the Saline County lands, and which, the uncontradicted testimony shows appellant used upon the land in the fall of 1918 and for which, as shown by the testimony of different witnesses Appellant James H. Lanham agreed to pay. It was a part of the same transaction covered by the verbal agreements, and we see no reason why it should not be accounted for in this suit.



Complaint is made by Appellant James H. Lanhams that the decree requires him to pay the item of seven hundred and fifty dollars which he agreed to pay in the written contract of December 26, 1918. It is contended by appellant that the receipts in evidence show that appellant has paid this item in cash to Coleman to apply upon his mortgage covering the Saline County farm. Just what were the exact terms of the contract as to the amounts to be paid, is somewhat in dispute and difficult to arrive at with mathematical precision. Appellant's brief and argument does not tend to elucidation. Taking the wording of the contracts and the undisputed testimony, it seems to be clear that appellant traded his city property (said to be of the value of \$10,000) to appellee for his three hundred and six acre farm (said to be worth \$50 per acre), subject to a mortgage of five thousand dollars, and appellant agreed to pay appellee one thousand dollars difference between the properties. The city property was to be clear and appellee was to apply the one thousand dollars paid by appellant upon the Coleman mortgage covering appellee's farm, reducing that mortgage to four thousand dollars. This was the first written contract. Coleman, Stahl and Taylor, who held the mortgage notes secured upon the farm, insisted upon the entire debt being paid, and this necessitated different arrangements and led to the second contract, which was executed December 26, 1918. Appellant and appellee had each deposited with Coleman the sum of two hundred and fifty dollars. Later each party deposited one thousand dollars with Coleman to carry out the contract. Up to this time appellee had deposited twelve hundred and fifty dollars, which he never received back, and appellant had deposited twelve hundred and fifty dollars.

We take appellant's testimony for the payments which he made to Coleman and Taylor to release title to this land. Appellant testified and produced receipts to show, that he paid Coleman one thousand dollars, twenty-five hundred dollars and seven hundred





and fifty dollars to apply upon the mortgage debt, making a total of \$4250. He also produced another receipts showing he had deposited with Coleman two hundred and fifty dollars as a forfeit, which was applied upon the mortgage debt, and he testified that he paid Stahl and Taylor seven hundred and fifty dollars, making the total five thousand dollars in addition to the forfeit deposit. Of the above moneys \$1250 was furnished by appellee and appellant testified that he was compelled to place mortgages upon the city properties to the amount of four thousand dollars, which appellee was entitled to take clear. From these figures it is plain that appellant is still indebted to appellee in the sum of seven hundred and fifty dollars, if the mortgage on the city property was operative for only thirty-five hundred dollars against appellee. That would be the exact amount. In any event, from appellant's testimony the item of seven hundred and fifty dollars should have been included in the decree. That figure is arrived at either by excluding the five hundred dollar mortgage on the city property or by excluding the forfeiture checks of two hundred and fifty dollars each, and accounts for the reducing of the cash payment from one thousand dollars in the first contract to seven hundred and fifty dollars in the second contract required to be made by appellant. In fact, the master's report finds that the encumbrance upon the city property was thirty-five hundred dollars, which eliminates all other questions as to the correctness of the item of seven hundred and fifty dollars found in the decree.

Appellant assigns error in that the decree directs appellant to convey to appellee Lot 3 and the east 21 feet of Lot 4 in Block 14 of Mason's addition to the City of Springfield. Apparently this description means and intends to cover the premises described in the contract as the property located at 116 W. Carpenter Street in the City of Springfield. The description in





the decree follows the finding and description in the master's report and appellant having made no objection before the master or exception before the chancellor to the finding as made, it is too late to raise that question for the first time in this court.

Appellants assign error upon the finding and decree that the conveyance by appellant James H. Lanham of the lands in Saline County to his father (appellant) was made in bad faith and with the intent to obstruct the rights of the appellee. The testimony in this record supporting the decree in this respect is conclusive. The conveyance was made without any consideration and was not placed of record until two months after appellee's bill of complaint was recorded in the Recorder's Office of Saline County. The testimony of Appellant James H. Lanham is contradictory as to how he came to make the deed and the purpose of it. He has exercised full control over the lands since the contract with appellee and Appellant James H. Lanham has furnished his own affidavit in this record, under oath, stating that he is the owner of the land. His father did not testify and makes no claim to the land. Under all the facts and the law the father can claim or have no greater rights in the Saline County lands than his son, James H. Lanham, holds.

We have not been able to cover all of the facts and arguments in this case. Apparently, when appellee was asking for abstracts and requiring to know the title to the lots in Springfield and depositing deeds to be delivered upon contingencies, appellant and the creditors of appellee were completing the contracts for him, accepting mortgages and deeds with different terms and provisions from those agreed upon and otherwise attending to appellee's affairs without his knowledge, authority or consent. It is further evident that a market having been found for the coal upon the Saline County lands has tended to the delay, confusion and excited scrutiny of the contracts. Taking the testimony altogether



there are but minor discrepancies between the parties as to the true state of the facts concerning the rate of interest upon mortgages and the periods they were to run. Appellee did execute a deed containing no reservation of the coal, oil or mineral rights, but it is fully explained and was so made at the request of Appellant James H. Lanham for the purpose of selling, for appellee's benefit, his entire interest in the farm. Appellant can not claim in this suit, under the contracts, that he is entitled to such rights because on December 26, 1918, in his letter he solemnly disclaimed such rights. Appellant, having entered into the contracts with appellee, and having secured the execution of the terms thereof, so far as they were favorable to appellant, can not in equity refuse to carry out the terms of the contracts obligatory upon him. (*Robinson et al v. Appleton, et al*, 124 Ill. 276.) The remedy lies against subsequent purchasers or assignees of the vendee taking with notice. (*Robinson et al v. Appleton et al, supra*.) and the remedy in this cause is not entirely confined to specific performance.

The decree of the Circuit Court of Sangamon County is affirmed.

Affirmed.





6889a  
Gen. No. 8194

250 I.A. 666<sup>2</sup>

Agenda No. 16

JANUARY TERM, 1928

Irene Seeders Clary, Appellee,

vs.

William G. Fair, Appellant.

Appeal from the Circuit Court, Tazewell County

SHURTLEFF, P. J. .

Appellee brought suit in the Circuit Court of Tazewell County against appellant to recover for injuries sustained in an automobile accident, while riding with appellant as an invited guest from Springfield to Pekin. The accident occurred at or near the intersection of State road No. 24 with the Town Line road, about one mile south of the village of Green Valley in Tazewell County.

Owing to correction lines upon the township line running east and west, State road No. 24, running north and south, with concrete sixteen feet in width in the center, originally made a turn to the west on the Town Line road of 132 feet and ten inches. In the construction of the concrete State road, this right angle turn has been effected by a curve in the road commencing about one hundred eighty feet south of the center of the Town Line road, then bearing northwest in the form of a capital letter S to a point about one hundred eighty feet north of the center of the Town Line road. The concrete highway, where it crosses the intersecting highway and for twenty-five to thirty feet south, runs in nearly a northwesterly direction, south of which point it curves to the south. The witness Chase testified that, "Both curves of the State road were dishd, a little slope to the inside of the curve, and then a shoulder on each side of the road. There was no shoulder on the hard road where it is intersected by the east and west road. The road on the east side of the pavement at the intersection with east

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BY [illegible]

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and west road was practically level. I believe there was a little depression on the west side. The intersecting roadway east of the pavement was level for a few feet. Then it might have been a little rough for a few feet. A person could drive a car immediately east of the paved portion of the road and parallel with it by driving slowly."

Apparently there were grade ditches on either side of the paved highway south of the intersection.

The testimony of appellee tends to show that as appellant was driving his Franklin car, containing five passengers, north upon the curve approaching the intersection, he swerved and drove it off from the concrete pavement into the gravel on the right hand side. Then there was a sound like breaking wood and the car went to one side and tipped over on its right side and was found facing west, north of the center of the intersecting highway near the culvert. The rear right wheel was demolished. Appellant was traveling from twenty-five to thirty-five miles an hour.

Appellant testified that he saw a car coming around the curve from the north, running at a high rate of speed very close to the black mark in the center of the highway; that he drove his car off from the pavement and almost immediately turned his wheel so as to bring the car back upon the pavement, but that the car seemed to go straight and did not respond when he turned it back toward the pavement but shot off the shoulder of the road and was overturned. Appellee was seriously injured.

There were three counts in the declaration. The **first count** charged that appellant so improperly, recklessly, negligently and carelessly managed said automobile that he drove **partially off the paved portion** of said road, and so carelessly, recklessly and negligently managed the car in **endeavoring** to get back upon said pavement, that said car overturned, etc.

The **second count** charged that appellant so improperly, recklessly, negligently and carelessly drove and managed his said automobile,



while **attempting to make the turn at said curve**, that by the said recklessness, negligence and carelessness of appellant the said car was overturned.

The **third count** charged that appellant so improperly, recklessly, negligently and carelessly drove and managed said automobile, **while attempting to make the turn** at said curve, that he drove off the paved portion of said road and so carelessly, recklessly and negligently drove and managed said car, in **endeavoring** to get back upon said pavement, that said car overturned, etc.

There was a verdict and judgment for appellee in the sum of twenty-five hundred dollars and appellant has appealed.

It is first contended by appellant that there is no direct, positive testimony tending to show that appellee was in the exercise of ordinary care for her own safety. But it is not essential that it should be made to appear by what is called direct and positive proof that appellee exercised ordinary care on the occasion in question. The degree of care exercised may be determined by circumstantial evidence or, as has at other times been stated, may be inferred by the jury from the circumstances appearing in proof. (**North Chicago R. R. Co. v. Rodert**, 203 Ill. 415.) Due care may be inferred from all the circumstances immediately prior to and at the time of the injury, and it is not incumbent upon appellee to establish care and caution by direct and positive testimony. (**City of Chicago v. Thomas**, 141 App. 125.)

The case at bar is to be distinguished from **Flynn v. Chicago City Railway Co.**, 250 Ill. 460, and **Opp v. Pryor**, 294 Ill. 547, in that in the case at bar nothing transpired to cause appellee to apprehend that she was or might be in a place of danger. The car coming from the north was traveling on the right hand side of the pavement and if appellant had not swerved to the right danger would not have been imminent and the accident would not have happened. At the time of the accident appellant's automobile





was not traveling at a rate of speed to give appellee warning of danger.

Appellee assigns error upon the admission in evidence, over objection, of two X-ray pictures taken of the bones in appellee's injured arm. The testimony upon which this admission was made was as follows: Dr. Lawrence R. Clary testified:

"I took the X-ray of the injury near the elbow, and of the other injury. The superintendent took the pictures at my direction. Two pictures were taken. They were on the same film. Those pictures show the condition of the fracture at the time she was in the hospital after the injury. They correctly show the condition of the arm and the injuries. We used those pictures in prescribing and treating and reducing the fractures. The pictures show two fractures. The pictures were taken under my direction. I was present. I instructed the operator how the pictures should be taken. He did that. These films correctly show the condition from the view-point from which the picture was taken."

Dr. Balcke stated:

"I was present when the X-ray pictures of the arm were taken. Dr. Clary and the technician for the X-ray were also present. Pictures were taken under the supervision of Dr. Clary and myself to ascertain the extent of the bone injury. Exhibit 2 is the picture taken at that time. That film correctly shows the injury to the bone structure. I have been supervising the taking of X-ray pictures fourteen years."

In addition appellee gave a full account of her injuries in her direct and cross-examinations, and Doctors Balcke and Clary each gave complete descriptions of the injuries to appellee and the treatment of her independent of the X-ray pictures. Under the facts in this case the proof conformed to the rules laid down in **Stevens v. Illinois Central Railway Company**, 306 Ill. 370, and





in any event appellant was not prejudiced by the proof.

Appellant assigns error upon the court's refusal to permit appellant to inquire, on cross-examination of appellee, the following questions:

"Q. In your opinion was the Fair car in which you were riding approaching the other car at too rapid rate of speed?

Did you consider that the Fair car was traveling at an excessive rate of speed as it approached that curve that day on the south?"

The court sustained an objection to the first question on the ground that it called for a conclusion and to the second question on the ground that it was a question for the jury to decide. It is plain that whatever appellee may have had in her mind at the time of the trial, after the injury, would have no bearing upon the case, and that the objection was properly sustained to the first question. As to the second question, it was not charged in the declaration that appellant was negligent in running his car at an excessive rate of speed and was not an issue in the case. The objection was made that the question was not in proper form. If the question of speed did have anything to do with the accident or injury, the question did not seek to elicit any fact or circumstance that would aid the jury in determining the ultimate fact. Appellee could as well have been asked if she considered that she was guilty of contributory negligence. If material, the question called for an opinion upon an ultimate fact and invaded the province of the jury.

Appellant assigns error upon the giving of appellee's first instruction as to the preponderance of evidence, in that it omits the subject of interest or lack of interest and the opportunity that witness may have for observing or knowing the matters about which he testifies. These subjects were fully covered by appellee's first modified instruction.



Appellant assigns error upon the giving of appellee's third instruction as follows: "You are instructed that under the law of this state that no person shall drive a motor vehicle upon any public highway in this state at a speed greater than is reasonable and proper, having regard to the traffic and the use of the way or so as to endanger the life or limb of any person."

The instruction states the law of the state and is not a mandatory instruction. While it is true that the declaration did not charge negligence, based upon the statute regulating speed in this state, the declaration did charge that appellant negligently and carelessly drove and managed his said car, **while attempting to make the turn at said curve**, and that by said negligence and carelessness, the car was overturned. There was testimony tending to show that, "A person could drive a car immediately east of the paved portion of the road and parallel with it by driving slowly," and it may be that negligence could be predicated upon driving off from the shoulder of the paved road at one rate of speed when it would not be negligence to drive off from the same shoulder at a lesser rate of speed. We assume that it was not negligence to drive upon the paved highway in the open country at the rate of thirty miles an hour. However, to drive off from the shoulder of a paved highway, going at the rate of thirty miles an hour, may become negligent and careless driving; and when one intentionally drives off from such shoulder the negligence does not consist in violating the law as to speed, but it may become reckless and careless driving. In any event, it is not plain how the jury could become confused by being instructed as to the law regulating speed. There was no error in giving the instruction.

Some criticism is made as to the giving of appellee's fourth given instruction and appellee's fourth modified instruction, but the objections are not such that we deem it of importance to set out the instructions.





Appellant presented the following instruction: "The jury is further instructed that if you believe from the preponderance of the evidence that the driving of the defendant's automobile partly off the paved roadway, and the overturning of defendant's automobile, was the result of a mere accident and happened without any negligence of the defendant, then the plaintiff cannot recover." But the court modified it to read as follows: "The jury is further instructed that if you believe from the preponderance of the evidence that the driving of the defendant's automobile partly off the paved roadway, and the overturning of defendant's automobile, happened without any negligence of the defendant, in the management of his automobile, then the plaintiff cannot recover."

It is assigned as error that the court eliminated the words, "A mere accident" from the instruction and inserted after the words, "without any negligence of the defendant," the words, "in the management of his automobile."

While we find nothing erroneous in the instruction as offered by appellant, we cannot hold that the modification of the instruction constituted reversible error. The instruction as given comprehended "a mere accident" as a matter of argument, and could not have been confusing to the mind of any juror.

Appellant assigns error on the ground that the court improperly permitted appellee's counsel to cross-examine appellant on the witness stand as to how the accident happened. Appellee on her direct case had offered no testimony tending to establish that part of the first and third counts of the declaration, charging that appellant, after he drove off from the pavement, endeavored to drive his car back upon the pavement. Appellant, while on the witness stand in his own behalf, had testified:

"As I was making the turn I saw another automobile coming south. I first saw it when it was entering the other end of the





'S' curve about 200 feet away. When it got close to me I thought it was pretty close to the black line in the middle of the road. The first time I noticed it was close to the black line was when it came up close to me. I pulled off to the right as far as I could so as to allow plenty of room between the two cars. Following that I slipped off the pavement. I tried to keep the car on its course, but instead it seemed to shoot straight ahead and turned over."

On cross-examination appellee's counsel asked him if he drove off the pavement at the intersecting road and he answered, "That runs east and west, south of there."

Then followed these questions and answers:

"Q. Then you tried to get back on the pavement, did you not?"

Objection as not proper cross-examination.

"The Court: I think he may answer.

"A. Yes, I tried to keep the car in its course.

"Q. You turned your wheel so as to bring your car up on the pavement?"

Objection as not proper cross-examination.

"The Court: He may answer.

"A. Yes, sir. I did that almost immediately, and as I started to turn the car back upon the pavement it went over. It seemed to go on straight; didn't respond when I turned it. It shot off the shoulder of the road, over the bank, and upset. That was when I tried to turn it back towards the pavement.

"Q. When you were trying to turn it back toward the pavement was when the hind wheel crashed, was it not?"

Same objection.

"The Court: Answer.

"A. Yes, I suppose it was. It went over on its right side."

Appellant insists that the cross-examination was not confined to the facts to which the witness had testified and was an improper attempt in the first instance to establish a branch of her case by



cross-examination of her adversary's witness, citing **North Kankakee St. Ry. Co. v. Blatchford**, 81 Ill. App. 612. We cannot agree with that contention. Appellant had testified that he "slipped off the pavement and tried to keep the car on its course." The "course" of the car had been upon the pavement and just what appellant meant by "trying to keep the car on its course," was subject to the widest and most searching cross-examination. In **Chicago City Railway Co. v. Creech**, 207 Ill. 400, the court held:

"A witness may be cross-examined as to his direct testimony in all of its bearings and as to whatever goes to explain, modify or discredit what he has stated in his first examination."

Some other errors are assigned, none of which, however, do we deem of sufficient importance to extend further this opinion.

From all the testimony in the case, and especially from appellant's it is apparent that the car in question left the shoulder of the pavement some little distance to the south of the south line of the intersecting highway where the dirt was not level with the pavement, and where there were depressions in the road and a ditch to the right.

The question of the negligence of appellant and the due care of the appellee having been fully and fairly submitted to a jury, we find no sufficient reason in the record for disturbing the verdict. The judgment, therefore, of the Circuit Court of Tazewell County is affirmed.

Affirmed.

Mr. Justice Niehaus took no part in the decision of this cause.





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250 I.A. 666<sup>3</sup>

General No. 8200

Agenda No. 20

JANUARY TERM, 1928

Benjamin F. Trimble and St. Aloysius Orphan Society, of Quincy, Illinois, a Corporation, Appellee,

vs.

Spurgeon Marney, Anna Marney, and Roy D. Johnson as Executor of the last will and testament of Henry Weber, Deceased, Appellants.

Appeal from the Circuit Court of Adams County.

SHURTLEFF, P. J.

The same questions are raised upon this appeal that are involved in the appeal in Gen. No. 8199, **Sinnock, Adm'x. et al v. Marney et al**, and this court having affirmed the decree in the former case, it follows that the decree should be affirmed in this case. It cannot be contended that the County Court of Adams County was without jurisdiction to hear the proofs as to the wills in question until the Circuit Court of Adams County had amended its decree of January 9, 1925, in the former will contest case. That decree, with the record exemplifying it, was always sufficient to apprise the world that the court intended to and did render void the will under date of May 2nd, 1923.

The judgment of the Circuit Court of Adams County is therefore affirmed.

Affirmed.





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250 I.A. 666<sup>4</sup>

General No. 8216

Agenda No. 11

APRIL TERM, A. D. 1928

Bertha E. Berghofer, Appellant,

vs.

Junette Berghofer, et al., Appellees.

Appeal from the Circuit Court of Adams County.

SHURTLEFF, J.

This is an appeal from a decree of the Circuit Court of Adams County, dismissing for want of equity a bill of complaint filed by appellant to set aside an antenuptial contract entered into between appellant and Henry J. Berghofer in his lifetime and prior to marriage. Appellees filed their demurrer to the bill, which the court sustained, and appellant, standing by her bill of complaint, the court dismissed the bill.

Appellant charged in her bill that on October 20, 1921, she was engaged to be married to said Henry J. Berghofer, since deceased, and that on October 23, 1921, at Quincy, Illinois, she was lawfully married to him, and from thence until his death, which occurred on July 5, 1927, she lived and cohabited with him as his wife and that she is his surviving widow.

It is further charged that on October 20, 1921, while she was still engaged to be married to the said Henry J. Berghofer, at his request they signed an antenuptial contract which is in the words and figures following:

"THIS AGREEMENT made and entered into this 20th day of October, 1921, by and between Henry J. Berghofer, of 1122 Kentucky Street, Quincy, Illinois, Party of the First Part, and Mrs. Bertha E. Baker, of Palmyra, Marion County, Missouri, Party of the Second Part, as follows, WITNESSETH:



“THAT WHEREAS, the party of the first part and the party of the Second part in consideration of getting married to each other and desiring to have a mutual understanding and agreement as to their property rights and as to the right that each should have in the property of the other, or in the estate of the other, have in consideration of such agreement to get married agreed and contracted as follows, to-wit:

“1st. That if party of the second part should die before party of the first part, then party of the first part agrees that he will bury party of the second part beside her first husband (whose name was Henry J. Berghofer; said Henry J. Berghofer being the first husband of said party of the second part) at Palmyra, Missouri.

“2nd. If the said party of the first part should die before party of the second part, then party of the second part is to have and receive One Thousand (\$1,000.00) Dollars from the estate of the said party of the first part; said sum to be paid to her by the Executor or Administrator of the estate of party of the first part as soon after the death of party of the first part as is practical; which said sum of One Thousand (\$1,000.00) Dollars is to be paid in full of all claims, rights and demands which said party of the second part as the widow of party of the first part has in the estate of said party of the first part and said party of the second part in consideration hereof agrees, binds and obligates herself to accept said sum of One Thousand (\$1,000.00) Dollars in full of all her rights, marital or otherwise, in the estate of said party of the first part and this contract shall be a full relinquishment and quit claim of all of the rights of party of the second part as the widow or otherwise in any real estate which party of the second part would have in any real estate which party of the first part may own at the time of his death and party of the second part hereby covenants and agrees that she will not claim or attempt to claim or assert any right, estate or interest whatever in any real estate which party of the first part may own at the time of his decease.





"3rd. In further consideration hereof, it is mutually agreed and understood that each party hereto has and retains all of the property which each owns at this time or may hereafter acquire and each party shall have the full use, possession and control of any and all property which he or she owns at this time or may hereafter acquire and that neither party will interfere with the other in the use, possession, control and management of the property of the other.

"4th. If for any reason or on any account whatever it should develop that the parties hereto cannot get along together and live together as husband and wife and a separation should occur, then and in that event the said party of the second part agrees, binds and obligates herself not to claim or demand by way of alimony, suit money, support or for any other reason or purpose, whatever, of party of the first part a sum of money in excess of One Thousand (\$1,000.00) Dollars and said party of the second part agrees to accept in full of any claim or demand she has against party of the first part whatever the nature of the demand may be such sum as parties may mutually agree upon under One Thousand (\$1,000.00) Dollars, but in no event and under no circumstances is party of the second part to claim or demand a greater sum than One Thousand (\$1,000.00) Dollars.

"IN WITNESS WHEREOF, the parties hereto have signed their names the day and year first above written.

(Signed) Henry J. Berghofer

Mrs. Bertha E. Baker."

This contract was duly acknowledged and delivered. It is averred in the bill that at the time of signing said contract appellant owned no real estate and had no interest in any lands, and that her entire personal estate did not exceed in value the sum of five hundred dollars. It was further averred that the said Henry J. Berghofer then and there owned and was possessed of personal estate





of the value of seventy thousand dollars, and of real estate of the value of six thousand dollars; that the provision made for the appellant, under the terms of said contract, was grossly disproportionate to the means and wealth of the said Henry J. Berghofer and wholly inadequate compared with the estate of the appellant; and that by reason thereof the antenuptial agreement constitutes a fraud upon the rights of appellant. She further alleges that aside from the fact of her marriage to said Henry J. Berghofer she has not accepted said antenuptial agreement, nor any of the provisions thereof, and that she has not received or accepted any of the property therein granted to her. It was further averred that neither before nor at the time she executed and acknowledged said antenuptial agreement, nor at the time the same was delivered, nor before or at the time of her marriage to said Berghofer, did she know or was she informed as to the extent, character, nature and value of the estate of Henry J. Berghofer, deceased.

It is further charged that said deceased left a last will and testament, with various codicils thereto, which was admitted to probate on October 4, 1927, in the Probate Court of Adams County; that the probate of said will and codicils is now in full force and effect; that the only provision for appellant made in said will and codicils is a trust fund, by which the sum of ten thousand dollars is placed in trust with the State Street Bank and Trust Company, and the income therefrom is to be paid to appellant for and during her natural life, "or so long as she remains the widow of the said Henry J. Berghofer, deceased," and also the right to occupy the homestead of the said Henry J. Berghofer for one year after his death and to retain three hundred dollars worth of the household furniture of said deceased. The bill further expresses the desire of the complainant to renounce the terms of said will, but charges that such renunciation cannot be made unless said agreement is set aside, "for so long as the same stands, it is an insuperable obstacle to such renunciation."



There was a prayer for an injunction that said antenuptial agreement be cancelled and for general relief. There was a demurrer to the bill generally and specifically, based upon numerous grounds, the principal objections to the bill being that it does not set out the will in full and that the appellant cannot, in equity, seek to set aside said contract until she has first renounced the terms of the will, and it is further contended by appellees (by demurrer) that appellant is in no manner hindered in renouncing the terms of said will by the existence of said contract, and that the Probate Court of Adams County has jurisdiction of the entire subject matter and, **in effect**, that appellant has an adequate remedy at law.

Both parties seem to overlook the terms of the antenuptial agreement, some of which have been passed upon by the Supreme Court in language which it is difficult to misunderstand. The fourth clause of the contract provides that if for any cause the parties should not get along together or live together, "the second party agrees, binds and obligates herself not to claim or demand by way of alimony, suit money, **support** or for any other reason or purpose whatever, of party of the first part a sum of money in excess of one thousand dollars." Under the so-called "property settlement" in the contract, appellant agreed to accept the sum of one thousand dollars at testator's decease, and waive all other rights and claims of every kind and nature in the testator's property and estate. Under the provisions of clause four above quoted, Berghofer reserved the right to live with appellant after marriage or separate from her, as he saw fit, and upon the payment of a sum of money not in excess of one thousand dollars he was to become discharged and released from all further claims for **support**, and including every other claim and obligation. In fact, the substance of the contract is that the testator (living or dead) had purchased a wife for the sum of one thousand dollars which he could "discard" at pleasure and be released from all further obligations. The courts have condemned contracts of this nature, as against public policy, and





declared them void. (**Lyons v. Schanbacher**, 316 Ill. 573; **Van Koten v. Van Koten**, 323 id. 327; **Hall v. Woods**, 325 id. 135.)

In **Lyons v. Schanbacher**, *supra*, the court held: "The purpose of this agreement was the renunciation of the marital obligation. One consideration for its execution was the release of appellant forever from any obligation to support or contribute to the support of his wife. The duty of the husband to support the wife is imposed upon him by law. It does not depend upon inadequacy of the wife's means but upon the marriage relation. Husband and wife may contract with each other as to their mutual property rights, but the husband cannot by contract, either before or after marriage, relieve himself of the obligation imposed upon him by law to support his wife. 13 R. C. L. sec. 220, p. 1188, and sec. 406, p. 1363; **Hill v. Hill**, *supra*, and note to same case as reported in 12 L. R. A. (n. s.) 848; **Ryan v. Dockery**, (Wis.) 126 A. S. R. 1025; **Corcoran v. Corcoran** (Ind.) 12 A. S. R. 390; **Ott v. Hentall**, 51 L. R. A. 226."

In the case at bar the rule would apply to the entire contract under the language further used in **Lyons v. Schanbacher**.

"Counsel for appellees contends that under the decision in **Luttrell v. Boggs**, *supra*, the whole agreement is not invalidated by the provision for the release of the husband from any obligation to support his wife; that even if that covenant is void the remainder of the contract is valid, and as no claim was ever made upon appellant by the wife for support, the contract should be sustained as to the other covenants and agreements. It cannot be controverted that the covenant or agreement for the release of appellant from any obligation to support his wife is contrary to public policy and void. It cannot be known whether it would have been entered into if that consideration had not entered into its execution. As the parties were then situated, the agreement releasing appellant from any obligation to support his wife was the only benefit he got out of it. As he at the time the agreement was made had no property, he





received no benefit from his wife's agreement to release all right she might have in all the property he then owned. It is true he might have afterwards acquired property, and it is also true his wife might have afterwards lost the property she had when the agreement was made. The invalid provision was so material a consideration that it rendered the entire contract invalid. The rule has long been established that if any part of the entire consideration for a contract is illegal the whole contract is void. When valid provisions of a contract are blended with invalid provisions the whole contract will be void. That which is bad destroys that which is good and both perish together. **Crichfield v. Bermudez Paving Co.** 174 Ill. 466; **Douthart v. Congdon**, 197 id. 349; **First Nat. Bank v. Miller**, 235 id. 135; **Hill v. Hill**, *supra*."

In **VanKoten v. VanKoten**, *supra*, the court held: "Marriage is a civil contract to which there are three parties,—the husband, the wife and the State, and it is regarded as a status based upon public necessity and controlled by law for the benefit of society at large. (**Leland v. Leland**, 319 Ill. 426.) One of the contractual obligations of the marriage contract is the duty of the husband to support the wife, and this contractual obligation cannot be abrogated without the consent of the third party,—the State. Husband and wife may contract with each other as to their mutual property rights, but the husband cannot by contract, either before or after marriage, relieve himself of the obligation imposed upon him by law to support his wife, and a contract between husband and wife one of the material provisions of which is that the husband shall be relieved of the obligation imposed upon him by law to support his wife is illegal and void as being contrary to public policy. (**Lyons v. Schanbacher**, *supra*.) In the instant case one of the material provisions of the agreement was, 'the said party of the second part hereby releases all claims, rights, title or interest to the party of the first part from making any claim for support or maintenance in any manner



from the party of the first part.' This provision was not only a material one, but, as stated in the agreement, it was one of the principal objects of the agreement. The agreement was therefore contrary to public policy and void, and this court cannot, therefore, place its sanction upon it and affirm a decree which finds it to be a valid and binding agreement."

It has been further held that there cannot be a ratification of a contract void, as against public policy, and that no party is estopped from asserting its invalidity in any court. (**Lyons v. Schanbacher**, *supra*; **Durkee v. People**, 155 Ill. 354; **Galpin v. The City of Chicago**, 269 Ill. 27.)

In **Lyons v. Schanbacher**, *supra*, the court further held: "After the separation agreement was entered into, appellant joined his wife in a deed conveying real estate, and counsel for appellees contends this was a ratification of the contract. A contract illegal as against public policy cannot be ratified. (Elliott on Contracts, sec. 6779; **Coppell v. Hall**, 7 Wall. 542; **Lyon v. Waldo**, 36 Mich. 345.) This court has held an illegal contract cannot be ratified, nor is there any estoppel against asserting its invalidity. (**Durkee v. People**, 155 Ill. 354; see, also, **Galpin v. City of Chicago**, 269 Ill. 27.) In **Coppell v. Hall**, *supra*, the court said the defense is not allowed for the sake of the party seeking to escape his contract but for the sake of the law.

"We are obliged to hold that a material part of the consideration for the agreement was contrary to public policy, illegal and void and that the whole contract must be held illegal."

In **Durkee v. The People**, *supra*, the court said: "An agreement to do an act forbidden by statute is not binding. (**Penn v. Bornman**, 102 Ill. 523; **Cincinnati Mutual Health Ass. v. Rosenthal**, 55 id. 85; **Rockhold v. Canton Masonic Benevolent Society**, 129 id. 440, and 26 Ill. App. 152.) And it would be absurd to say that either persons or corporations can abrogate such a statute, upon the theory of an estoppel, by simply contracting to do the prohibited act."





Without regard to any of the questions raised and discussed by appellant and appellees in their respective briefs, and not expressing an opinion as to any of said questions, we are firmly convinced that the antenuptial agreement between appellant and the testator was entered into in violation of the public policy of this State and in its entirety is null and void. It is further the opinion of this Court that appellant is not estopped or hindered from renouncing said will and asserting the invalidity of this antenuptial contract in any court or place in the State of Illinois, and that its mere presentation on its face will show that it has no force or value as a valid instrument. She, therefore, has an adequate remedy at law and it does not require a hearing or the jurisdiction of a court of equity to determine the issues involved in this suit. The Circuit Court of Adams County did not err, for the reasons stated, in sustaining the demurrer and dismissing appellant's bill for want of equity.

Affirmed.





6891a

250 I.A. 666<sup>5</sup>

General No. 8159

Agenda No. 3

JANUARY TERM, A. D. 1928

Clarence Crouch, Appellee,

vs.

Chicago & Eastern Illinois Railway Company,  
Appellant.

Appeal from Circuit Court, Vermilion County.

ELDREDGE, J.

Appellee brought this action against appellant under the Federal Employers Liability Act, in the Circuit court of Vermilion County, and recovered a judgment in the sum of \$500.00 for personal injuries received while an employee of the latter. He lived in the town of Tilton and was employed by appellant in its' railroad yards east of the City of Danville, known as the lower Brewer yards. His duty was to run a stationary engine for the purpose of pumping compressed air into a tank. The engine was located inside of a building while the tank was on the outside thereof. From the compressed air tank, leads ran to different portions of the yard where they were attached to different cars and trains so that the compressed air could be furnished thereto as needed. About half of the trains which came into the yards and to which compressed air was furnished were engaged in interstate commerce. The pump operated substantially the whole twenty-four hours of each day and the engineers or pumpers



operating the engine were divided into three shifts of eight hours each. Before the day of the injury complained of, appellee had operated the pumping engine in question for about four and a half years and for the last two years of that time had the first shift and worked from seven o'clock in the morning until three o'clock in the afternoon. The engine was of a single cylinder type, operated by steam and had an air chamber at one end. The air from the air chamber was carried out into the tank through a pipe two and a half or three inches in diameter. There was a piston on either side of the engine, each working in the same direction at the same time. When the engine stopped on a dead center the method of starting it was, first to release the air pressure from the air chamber, then to place one foot on a spoke of the large fly-wheel, grasp the top of the fly-wheel with the hands and pull the wheel over past the dead center and turn on a small pressure of steam.

The declaration consisted of two counts, in one of which it is charged that for six weeks prior to the accident it had been difficult or impossible for appellee to start the engine in the usual manner and in order to do so it had been necessary to pass the end of a crow-bar through the fly-wheel and over one of the





spokes and engage the end of the crow-bar beneath another part of the engine and then press down upon the other end and turn the fly-wheel in this manner; all of which appellant knew or by the exercise of ordinary care could have known; that when started in the manner last mentioned, the engine would start slowly and gradually so that appellee always had time to withdraw the crow-bar before it could be caught and thrown by the fly-wheel; that on the date of the injury during appellee's shift the engine had stopped and he attempted to start it with the crow-bar in the manner described, when the engine suddenly started with great force and speed and before he could withdraw the crow-bar from the fly-wheel the same became caught by the succeeding spoke of the wheel and was thrown against plaintiff's legs which were injured; that during all of said time plaintiff was exercising due care and did not know of the risk or injury by so starting the engine or appreciate the danger therefrom. In the second count it is charged that it was the duty of the appellant to use reasonable care and diligence to furnish appellee with reasonably safe appliances, tools and machinery, and in this it failed in that the tank containing the compressed air was equipped with an escape valve or blow-off valve, which when properly working would, when the air pumped into said tank reached the pressure of seventy points,





permit the air to escape from the tank and thereupon it would be driven back from the lead pipe into the air chamber of the pump and thereby cause the engine to stop; that for six weeks prior to the injury said blow-off valve had become defective and out of repair and would not permit the air to escape from the tank when the pressure reached seventy points, but would hold the air until the pressure reached ninety pounds and by reason thereof the compressed air in the tank was driven back through said lead pipe into the air chamber of the pump and thereby cause the engine to stop. That appellee complained to appellant and thereupon the blow-off valve was taken off the air tank, repaired and replaced, but did not thereafter work properly and did not permit the air to escape from the tank when the pressure reached seventy pounds, but that it was forced back from the tank through the lead pipe into the air chamber of the pump and caused the engine to stop; that appellee again complained to appellant of the condition of the blow-off valve and was told by appellant that the same was allright, and that it would work allright; that on the day aforesaid, by reason of the above conditions, the engine stopped and appellee, in order to start it used a crow-bar in the manner described in the first count; that while in the exercise of due care and without knowledge of the dangers from attempting to



start the engine in said manner, the engine suddenly and with great violence started and the crow-bar was hurled against plaintiff's legs in the manner hereinbefore described.

The contention of appellee cannot be sustained by the evidence because, first, it is self-evident, even to a layman, that if there was any back pressure against the pistons of the engine from the air compressor, instead of causing the engine to start suddenly it would have to operate against such pressure and the effect thereof would tend to prevent the engine from being started at all. Second, it is conclusively shown by the evidence that the air compressor engine was of standard guage and of a standard type and was equipped with discharge valves which prevented the air from returning back into the cylinders after once passing through the valves. The air compressor must necessarily have been so equipped or no air could have been retained therein and there is no evidence tending to show that these valves were defective in any way. Third, it is conclusively shown by the evidence that the pop-off valve attached to the tank outside of the building had nothing whatever to do with the starting of the engine and its one purpose was to permit the escape of air from the tank after it had been compressed to a certain pressure so that too great a pressure of air might not enter the air hose





of the cars and explode them. The air was drawn into the outside tank from the air compressor by suction and the one valve in the lead-in pipe which connected the air compressor with the outside tank was what is known as an angle valve which was used occasionally, when repairs were to be made, to shut off the back pressure of the condensed air in the tank so that it would not pass back into the air compressor, while the repairs were being made. This was a valve operated by hand and could have had no influence upon the starting of the engine. Fourth, the evidence conclusively shows that there could not have been any material defect in the apparatus for the reason that the man who operated the engine on the shift preceding that of appellee had no trouble in starting it in the usual and customary way, and the man who took the place of appellee at the engine after he was injured, started and operated the same in the usual and customary way and no defects in the engine, compressor or tank were found or discovered or repaired. Fifth, shortly after the accident appellee made a written statement in regard to the same, to appellant. To the question: "Was this accident, in any way, the result of any defect in any of the tools or machinery?", his answer was "No." In a report made by him to the insurance department of appellant, in answer to the question: "In your opinion, was there any defect in \*





\* \* \* equipments, tools, machinery or other appliances \* \* \* or any carelessness on the part of the railroad or anyone in the railroad's employ, tending to cause the accident. If so, what or whom?", he answered, "None." In another written statement he states: "It has always been the practice of myself and the other pumpers to use the bar in starting the air compressor when it is so far beyond center that it cannot be started by pulling the fly-wheel with our hands, and I have done it in this manner ever since I started to work four years and a half ago. This is the only way the compressor can be started except to bleed the air off. When this is done the compressor can be started by hand, but this takes time, and handicaps the men working out upon the repair track. **The compressor was in the usual condition and in good shape** as only the week before a new piston rod and packing had been placed in it. The new piston made the compressor work a little harder, account being tight, but otherwise it was allright." Sixth, there is no evidence tending to show that appellant had any knowledge that its employees operating the air compressor engine had a practice of starting the same with a crow-bar when steam was on. For the reasons above stated it is apparent that the verdict is clearly contrary to the manifest weight of the evidence.

The proximate cause of the injury was not the stopping of the engine as that could harm nobody, but it was the use of the crow-



bar in starting the same. The reasonable inference from the evidence is that appellee attempted to start the engine under a too high pressure of steam, so that when the dead center was passed the engine started suddenly and violently instead of slowly and gradually, and threw the crow-bar against appellee in the manner stated.

Two instructions were given to the jury on behalf of appellee. The first instruction tells the jury that appellee had no right to compensation under the Workmen's Compensation Law and his remedy, if any, is against appellant for negligence on its part, if any negligence of appellant is shown by a preponderance of the evidence. Juries are presumed to be instructed upon the law applicable to the issues in the case. The only issues in the present case involved appellee's right of recovery under the Federal Employer's Liability Act and the instructions should have been confined to the law pertinent thereto. It was clearly erroneous to call the attention of the jury to the fact that appellee had no remedy under the Workmen's Compensation Act. Such an instruction presented no proposition of law applicable to the case and could not have been otherwise than harmful to appellant. The second instruction given on behalf of appellant is an abstract proposition of law from which it might be assumed that the machinery or engine was defective.





For the reasons stated the judgment is reversed and  
the cause remanded.





6892a

250 I.A. 667<sup>i</sup>

General No. 8197

Agenda No. 12

JANUARY TERM, A. D. 1928

Henry J. Howard and Ralph Howard, Appellees,

vs.

Frank Merriweather, Appellant.

Appeal from Circuit Court, Vermilion County.

ELDREDGE, J.

In this case the bill was filed by appellees to set aside an assignment of a certain contract for a deed executed by Grace B. Richardson of the City of Danville, Illinois, and Mrs. Mary Hannon of the same city on September 4, 1912, wherein Mrs. Hannon covenanted to convey to Mrs. Richardson a certain lot in the city of Danville for the sum of \$1400.00, to be paid for as follows \$100.00 cash, the receipt of which was acknowledged, and the balance in monthly payments of \$12.00 each on the first day of each month thereafter until the whole amount was paid, with interest at the rate of seven percent per annum on the whole sum remaining from time to time unpaid, and the payment of all taxes and assessments that might be legally levied upon said lot subsequent to the year 1912. The bill alleges, in substance, that said Grace B. Richardson died about May 30, 1925; that four days before her death she executed an assignment



of all her interest in said contract to appellant; that at the time of the execution of said assignment she was not of sound mind and memory, but was in a state of **extremis** on account of sickness from which she had suffered for a long space of time; that she was an aged woman and because of her state of health her mind and memory were so impaired as to render her incapable of making and executing any instrument in writing disposing of her interest in the property in question; that for a long space of time prior to her death appellant, who was not in any way related to her, was acting as a minister of the gospel of a certain religious sect known as the Seven Day Adventists; that he was her spiritual advisor and as such occupied a confidential and fiduciary relationship with her, lived in her home and occupied a part thereof as a meeting house for his congregation; that she was a hard working domestic servant and provided him with a home and most of his support and claimed to be her stepson; that during her last illness he was her sole companion most of the time and refused or neglected to provide her with medical attention; that said assignment was obtained by him because of her unsound mind and the exercise of an undue influence over her will and because of fraud practiced by him in consequence of his confidential and fiduciary relationship to her.





The answer denied that the deceased, at the time she executed the assignment was in a state of **extremis** and was incapable mentally of doing the same and denied all the charges of fiduciary relationship, undue influence and fraud. The facts developed from the record have been very meagerly and superficially set out in the briefs and arguments of both parties and much unnecessary labor has been imposed upon the court to ascertain the same. It appears that at the time Mrs. Grace B. Richardson died she was sixty-one years old and appellant was forty-five years of age. While Mrs. Richardson's husband was alive appellant became acquainted with them and visited them at their home. Appellant's chief occupation was that of a barber, although he did numerous other things all of which were honorable occupations. After her husband died the deceased took in laundry washings which occupied her time for several days a week. Just when her husband died is not shown. She had been for a long number of years, a member of the sect known as the Seventh Day Adventists. One of the tenets of this religion is that no labor shall be performed on Saturday. Appellant was also a member of this religious order. Whether Mrs. Richardson became a member of this order before or after her acquaintance with appellant is not conclusively shown. The evidence does show that she was a very sincere religious





Christian woman and there is nothing in the evidence tending to show that appellant was not a sincere Christian man. At the time of her death appellant had been living in her home for a period of fifteen or sixteen years. He, together with his son, moved into the house at her request sometime after her husband's death. They kept in the house what they called a tithe box and into this box Mrs. Richardson deposited the money she earned from her laundry work and he deposited his earnings. Out of this box the household expenses and the payments on the contract for the deed were made. They held religious services in one of the rooms of the house and also in the homes of other members of the sect. This arrangement had continued, as stated, for a period of fifteen or sixteen years. She called him son and he called her mother. It seems to have been a very satisfactory arrangement between them. On June 10, 1915, Mrs. Richardson conveyed to appellant an undivided one-half interest of all her right, title and interest in the said lot. This conveyance was duly acknowledged before a notary public and filed for record. The evidence further shows that on several occasions she had made statements to different persons that when she died she intended to leave the premises to appellant. Four days before she died she was taken with a severe cold and she executed an assignment of the contract to appellant.



A doctor was not called to see her until the morning of the day on which she died. He testified that at that time he found her suffering with lobar pneumonia but that her mind was clear and she knew everybody in the room and talked rationally and in his opinion was mentally capable of understanding usual business transactions. Four days prior to this time, when she executed the assignment, she was not sick enough to be confined to her bed, but was able to sit up in a chair and there is no evidence tending to show that at that time she was suffering from any mental disability or that appellant exercised any undue influence over her.

Mrs. Richardson had been married twice. By her first husband she had had two children, but they had disappeared many years before and there was no evidence as to whether they were living or dead or whether there were any descendants of either of them living. Appellees were grand-nephews of the half-blood of Mrs. Richardson, being descendants from the second marriage of her father and, of course, could not maintain this bill if the two children of Mrs. Richardson by her first marriage, or either of them, were living. The bill is based upon the presumption that they are both dead. Mrs. Richardson left no other heirs so far as known. One of the appellees lives in Indiana and the other in Kentucky. There is no evidence tending to





show that either of them ever visited Mrs. Richardson or corresponded with her or that she ever knew, in fact, that they existed. Such being the case they were not natural objects of her bounty and it was not unnatural for her, under such circumstances, to desire to leave this little unpaid for property to the one who had helped and befriended her for so many years and whom she had learned to respect and esteem.

In our opinion the evidence fails to sustain the allegations of the bill and the decree is reversed with directions to enter a decree dismissing the bill for want of equity.





68936

250 I.A. 667<sup>2</sup>

General No. 8198

Agenda No. 18

JANUARY TERM, A. D. 1928

Charles Worsham, Appellant,

vs.

Illinois Traction, Inc., Appellee.

Appeal from Circuit Court, Vermilion County.

ELDREDGE, J.

Appellee maintains and operates an interurban electric railroad over North Main street in the City of Danville, Illinois, and did so at the time of the accident to appellant, hereinafter mentioned. That part of the street where the accident happened, at the time thereof, was paved with brick and under the ordinance granting the right-of-way to appellee over said street, the latter was required to keep so much of the street in repair as lies between the rails and one foot on the outside thereof. Appellant brought his action against appellee to recover from personal injuries claimed to have been received by him while driving an automobile, because of certain defects in the street between the rails of the track. The declaration sets out the ordinance and charges the duty on appellee to maintain that portion of the brick pavement within its rails and for the space of one foot on each side thereof



in a reasonable safe condition for public travel and that appellee negligently permitted the bricks in the pavement to become loose and intermittently project and protrude above the surface making the same rough and unsafe for public travel, whereby his automobile ran into and struck the same and was greatly damaged and broken and appellee was greatly bruised and hurt, his hands being badly lacerated and cut, his nose and thigh bones broken, which said injuries are permanent and that he was put to great expense for medical and hospital bills and was prevented from transacting any business for thirteen months. The trial resulted in a verdict finding appellee not guilty.

Appellant testified that he lived in Tilton, Illinois, and was engaged in the restaurant and hotel business there; that on the morning of April 9, 1925, he left his home in his automobile and drove to the Lake View Hospital in Danville to see his wife, who was confined there. He left the hospital about noon, driving south on North Main street and when he reached a point about 200 feet south of Victory Bridge an automobile was parked on the west side of the street car track and a man got out of this car; that appellee pulled out to go around him and straddled the street car track; as he went to pull back his left front wheel hit some object and knocked the steering





wheel out of his hands; it threw the front wheels of his car on the east side of the tracks; he tried to stop the car with the brake, but his leg was paralyzed and as he went to pull back he had a collision with another car; that he was driving at a speed between twelve and fourteen miles per hour. His nose and his thigh were broken, his hands were lacerated and he had a large cut on his shin. He was taken to the Lake View Hospital in an ambulance and remained in bed from April 9 until June 21, 1925, when he was taken home, and remained in bed at home until the latter part of August when he was able to sit in a chair for six or eight weeks and then was able to get about on crutches until February, 1926, when he discarded the crutches for a cane, which he had to use until April, 1927; his leg is now an inch and a quarter shorter than the uninjured one; he paid \$203.00 for hospital services and \$156.00 for doctor's fees. That he was away from his work absolutely for eighteen months and for the next six months was only able to give very little of his time to his business; at the time of the accident he was fifty-nine years of age; on the day of the accident the weather was cloudy and hazy with a little mist and before the accident it had rained slightly; there was a hole in the pavement as if a brick had been knocked out right close to the inside of the

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west rail.

A witness Claude Lewsader, testified that he was a salesman for the Herendeen Bakery Company. Just prior to the accident he was driving his car about 250 feet behind appellant. That appellant's car was traveling between twelve and fifteen miles per hour and the witness was driving about the same speed; that appellant went to go around a car which was parked and as his left wheel went across the west rail his car swerved across the street and righted itself about the time it collided with a car coming north; that he examined the pavement after the accident and found that on the inside of the rails there were holes and a brick out, and on the outside of the rails there was a brick raised, sticking up above the rails an inch or two; that he had traveled over that street four times a day for the last seven years and had seen holes in the pavement between the rails and raised bricks on the outside of the rails before the accident; the raised bricks were about six inches outside of the west rail; he did not know whether the wheel of appellant's car hit the bricks or the holes, but knew he hit the obstruction and he was close enough to see the action of the wheels as he was directly behind him; the hole in the pavement was about 16 inches long, 4 inches deep and 4 inches wide, and was directly opposite to the place on the outside of the rails where the bricks were turned up. Mrs.



Muriel Farley testified that she and her husband were in an automobile about fifty feet behind appellant's car when the accident occurred; that appellant was driving about fifteen miles an hour; that she and her husband turned out to go around appellant's car when they saw him pull out to go around the parked car and then they slowed down and did not attempt to pass appellant's car; when appellant's car had passed the parked car he turned as though he was going back on the right or west side of the street and then she saw a brick fly and he swerved to the left or east side; at this time the left front wheel of appellant's car was inside of the west rail, and the brick flew easterly from inside of the west rail; appellant's car swerved to the east and when it started to straighten itself up it collided with the other car which was coming directly toward him; that at the time she saw the brick fly through the air, appellant's car was not going any faster than it had been, about fifteen miles an hour; that she passed back and forth over the street four times a day and that the street had always been rough near where she saw the brick fly. Charles Fleming, an attorney-at-law, and living in Danville, testified that five or six days after the accident he examined the pavement where it had happened and found there were two places where bricks were out of place and were sticking up two or





three inches above the surface; that in one place a brick was out entirely. W. D. Fleming, a resident of Danville, testified that about 1:00 p. m., on the day of the accident (the accident happened about 12:40 p. m.) he examined the street at the place in question and on the outside of the rails he found several bricks had edged up to two or three inches high and on the inside of the west rail there appeared to be a hole big enough for two large bricks to be placed in there; a little further north there were other places similar to these. The witness, C. F. Burrows, also a resident of the City of Danville, stated that four or five hours after the accident he examined the place in question and found several places where the bricks were raised and one or two places where the bricks were out along the east and west rails. The witness, J. C. Smith, was a plasterer and lived in Tilton. He testified that he was traveling in an automobile on the day in question and just before the collision between the two cars he saw appellant's car turn to the right and then shoot back to the left and then a car passed him and he stopped; that the car that passed him ran into appellant's car; that appellant's car turned to the west and then swerved back to the east before it collided with the other car going north; that appellant's car was traveling between twelve and fifteen miles per hour, while the car that hit





appellant's car was running about thirty-five miles an hour; that he took appellant out of the wrecked car and he was not able to stand up. At that time he went back and looked to see what it was appellant hit; that at the point where he saw appellant's car turn west and then swerve east there was a hole in the pavement and he saw the automobile tracks leading from the hole to appellant's car; that these tracks started to go from the rail and he hit this hole by the side of the rail; the hole was inside the track next to the east side of the rail; his tracks went on over these high bricks just above it which stood up fully two inches back from the rail on the west side and stood up two or three inches; he bumped over that and then his track went back to the east and then the other car hit him; these marks were plain to be seen after the accident.

On behalf of the defendant the witness, Colfax T. Martin, testified that he was a lawyer and resided on the east side of North Main street at the time of the accident; he traveled the street practically every day and don't remember that any bricks were raised an' inch or two on the outside of the rails at any place.' On cross examination he stated that he never made any examination of the street and didn't pretend to say there were no holes therein; that he didn't know; that they might have been there and he would not have seen them



because he didn't make any examination. Pearley L. Fugate testified that he lived in Danville and worked for the Indian Refining Co., and was driving the car that collided with the car of appellant; appellant's car made about three "crooks" before he turned and came across to where he (witness) was; his car came down the street toward the east, then back to the west, then back to the east, then back to the west until he got to the curb when it turned right across to the east, went over near the east curb, started up and headed directly south when the collision occurred. witness was injured and went to the hospital in the same ambulance with appellant and talked with him; he said he lost control of his car as he came off the bridge, that his foot got fastened in the pedals, that he didn't think to shut off the gas, that he hadn't driven a car but a few items before; that he (witness) traveled the street four times a day and never noticed any bricks out of place, and never took any notice of the bricks being raised between the rails; that appellant was driving thirty-five miles per hour and that he was going between fifteen and twenty miles per hour; he had been in the employ of appellee since the accident but was not in their employ at that time. W. M. Lape testified that he lived at 23 North Main street in Danville and was a fireman for the Wabash R. R. Co.; that he had been in the employ of appellee





but was not now; that he didn't see the accident, was going out of the door of his house about the time the two cars hit; never saw any holes or bricks bulged up above the rails at that time. William Guy Krites testified that he saw the collision from a place about 200 feet north of the place of the accident; saw an automobile going unusually crooked in the street, which he afterwards found was driven by appellant; his car was running twenty-five to thirty-five miles per hour; had no occasion to notice particularly any bricks being out and bulged up and don't remember anything of the sort. John L. Fugate testified that he was the brother of Pearly L. Fugate, who was injured in the collision; that he went to the place of the accident about 1:30 p. m., and did not notice any bricks protruding from the pavement nor any holes, though he made no examination. A. T. Carrington, an employee of appellee testified that he did not see the collision, but heard the crash and went to the scene of the accident. He did not observe that any bricks were out or protruding from the pavement. W. L. James testified that he traveled over this street three or four trips each day in his automobile, for about a year, and never noticed any brick being out or protruding; that he never paid any attention to the bricks or holes as it was none of his business. James Tapp, fourteen years old, testified that he had been to school and was en





his way home and saw appellant's car swerve from one side of the bridge to the other and hit a lamp post on the south end of the west side of the bridge and swerve to the east, then west and was about to run into an embankment in front of Martin's house when it swerved diagonally across the street car tracks then collided with a car headed north; that he had driven a car for four years and is a judge of speed and that appellant's car was going twenty-five to thirty-five miles an hour, that Fugate's car was going fifteen miles per hour; did not make any observation of the tracks.

Appellant, in rebuttal, denied that he told Fugate that he lost control of his car or that his foot caught or that he hadn't driven a car very much. He also denied that he told Lape that he hadn't driven a car very much and that it got away from him; he also denied that he hit the lamp post or curb and that his car did not wobble from side to side on the street. Also in rebuttal Farley testified that appellant's car did not hit the lamp post and did not wobble from side to side. Lewsader also testified that appellant's car did not wobble from one side of the street to the other until it collided with Fugate's car; that appellant's car did not hit any lamp post at the south end of Victory Bridge and did not nearly strike the wall in front of Martin's house. Smith also testified, in re-



buttal, that appellant's car did not wobble from side to side until it collided with Fugate's car and it didn't hit the lamp post at the south end of Victory Bridge and didn't collide with the west bank of the pavement near Martin's house; that it was impossible for him to hit the lamp post as he was in the middle of the street.

It is apparent that the preponderance of the evidence of the disinterested witnesses who testified upon the subject and who were in a position to see what occurred and who made any examination of the pavement, sustains appellant's contention that the pavement was out of repair and that one of the wheels of his car, either hit one of the protruding bricks or went into one of the holes, thereby causing his car to swerve to the side and it strongly supports his claim that his steering wheel, by reason thereof, was jerked out of his hands, causing him to lose control of the car. The most favorable construction in favor of appellee that can be placed upon this evidence is that it is conflicting. Under such circumstances errors which might not otherwise be sufficient to cause a reversal of the judgment, might be determining factors with the jury in arriving at their verdict. Upon the cross examination of appellant he was asked this question:





Q. Isn't it a matter of fact that he (Fugate) made a claim against you for damages to settle with him.

Objection sustained.

MR. TROUP: Got an admission from him.

MR. JINKINS: Move to strike that.

THE COURT: Sustained.

Q. Didn't you admit liability for that man's injuries and settle with him for it?

MR. JINKINS: Object to that.

THE COURT: Sustained.

MR. TROUP: I offer to prove by this witness that the plaintiff, Worsham, in this lawsuit admitted his liability to the driver of the automobile with which he collided at the time in question, and made settlement with said driver for the damages which were caused to the driver of that automobile. I make the offer to prove it by this witness.

Objection to offer sustained.

The above offer was made in the presence and hearing of the jury. The questions preceding it were incompetent and improper. The offer itself was wholly incompetent. Even if the facts involved therein were true they were immaterial to the issues in this case. After a court has ruled against the admissibility of evidence an offer of proof in regard thereto should never be made in the hearing of the jury. The jury might well have inferred from these questions and from the offer of proof that appellant had conceded that he alone was to blame for the accident which caused his injuries and that appellee was not responsible therefor.

~~On the cross examination of the witness Burrows, who testified on behalf of appellant, he was asked, and over objection required to answer, that he was in the insurance business and had been in that~~





~~persist in attempting to get such facts before the jury.~~

Appellee offered twenty-two instructions to the court, twenty of which were given. Six of them direct a verdict and a number of them repeat the same principles of law. Where a principle of law is repeated in a number of instructions it has the effect of giving undue prominence and importance to that particular proposition announced. The issues in this case were simple and there was no occasion for giving so many instructions.

Several other errors have been assigned and argued by counsel for appellant, but as they probably will not occur upon another trial need not be discussed.

For the reasons indicated herein the judgment is reversed and the cause remanded for another trial.



6594a

250 I.A. 667<sup>3</sup>

General No. 8201

Agenda No. 21

JANUARY TERM, A. D. 1928

Howard Kellie, Appellee,

vs.

John Moss, Jr., Appellant.

Appeal from Circuit Court, Vermilion County.

ELDREDGE, J.

This case originated before a justice of the peace and upon a trial *de novo* in the Circuit Court of Vermilion County, appellee recovered a judgment in the sum of \$270.00, for damages to his automobile resulting from a collision with an automobile operated by appellant.

At the time of the collision appellee was driving his car in a northerly direction on the east side of a paved highway, eighteen feet wide, at a rate of speed between thirty and thirty-five miles an hour. Appellant approached from the north on the west side of the highway driving his Ford car in a southerly direction at a rate of speed between fifteen and twenty miles per hour. As the two cars reached each other appellant's car suddenly swerved to the left and struck the car of appellee causing the injuries complained of. After the accident it was discovered that the left front tire on appellee's car had blown out. The questions in controversy are whether





the blow-out occurred before the accident and caused appellant's car to swerve to the left, thereby causing the injury, or whether the collision occurred by the negligence of appellant in driving his car and the blow-out in the tire was caused by its impact with the car of appellee. Counsel for the appellant contend that the competent evidence in the case sustains the first proposition while counsel for appellee maintain that the second proposition is established. Appellee placed three witnesses upon the stand who testified as experts, in substance, that a blow-out on a tire of the size on the Ford car, when the latter was running at a rate of twenty miles per hour, would have little or no effect and would not cause it to swerve to one side. It is urged that this testimony was incompetent in that there was no occasion for expert testimony and the same usurped the power of the jury. It is submitted that the driver of an automobile is not an insurer of accidents arising from its operation and that an accident occasioned through no negligence of the owner or driver is classed as an unavoidable accident with no liability on the driver or owner and that the expert testimony being incompetent, the evidence clearly showed that the collision was caused by the blow-out, for which appellant could not be held liable, and the case of **Klein v. Beeten**, 169 Wis,





385, is cited as a case directly in point. The court in that case said. "Liability in this case is not predicated upon any defect of the automobile. Liability is predicated solely upon the negligent operation of the car. The facts proved are, that an accident happened at a place where the road was smooth and in good order. Plaintiff contends that proof of this fact raises an inference of negligence in the operation of the car. When the car was righted, after the accident, the left hand front tire was found to be deflated by reason of a blow-out of the inner tube. It is not at all beyond the realm of possibility that the accident might have happened by reason of this blow-out. It is claimed on the part of the plaintiff that a blow-out could not have caused the accident unless the car was going at an excessive rate of speed. There is no proof of that fact in the record, **and we cannot take judicial notice that a blow-out of the front tire of a Ford automobile running at fifteen miles an hour could not produce an accident such as this.**" In this case, cited by appellant, it is held that the court could not take judicial notice that a blow-out of the front tire of a Ford automobile, running at fifteen miles an hour could not produce an accident such as this. The clear inference is that evidence would have been admissible to prove that fact, and under this authority the expert testimony admitted by the court



below was competent.

It is next urged that the judgment should be reversed because evidence was admitted to the effect that appellant's car was covered by an insurance policy. Most of this evidence was brought out on the cross examination of appellee by counsel for appellant. This proof is as follows:

“Q. And you further told him (appellant) that this accident was unavoidable?

A. No.

Q. Didn't you make an affidavit to that effect on the 8th of September, 1926?

Objection.

Q. I will change that question—didn't you state on the 8th day of September, 1926, that you couldn't say he was to blame for this accident. Didn't you further say that you thought it was unavoidable?

A. I didn't state that to him.

Q. Did you to anybody?

A. Yes.

Q. What do you say now as to whether that accident was avoidable?

A. It was explained to me by the insurance adjuster what that meant was he didn't deliberately run into me.

Q. Do you want to change that now, do you think it was avoidable?

A. I claim he didn't deliberately run into me.

Q. I am asking do you claim this accident was unavoidable?

A. I claim he didn't deliberately run into me.

#### RE-DIRECT EXAMINATION

Q. This affidavit that Mr. Wicks speaks about, with whom was the conversation when you made that affidavit?

A. Mr. Brandis.

Q. Who is he?





A. He is an insurance adjuster.

MR. WICKS—Object to that, he is not an insurance adjuster.

THE COURT—Objection sustained.

Q. What did he say his business was?

A. He said he came down for the insurance company to write an affidavit up.

Q. And did you have a conversation with him about this accident at that time?

A. Not at the time.

Q. At the time this statement was made?

A. Yes, sir.

Q. And what did he say with reference to the avoidability or otherwise of this accident?

A. Well, he was asking me questions about it and he wrote out this statement and when it came to unavoidable accident I asked him what that meant. Whether he didn't deliberately run into me and he said yes.

Q. And you always have said he didn't deliberately run into you?

A. Yes.

Q. And at the time of this accident you didn't go back to see where Mr. Moss' car was?

A. No, sir.

Q. Why didn't you go back and examine his car?

Q. What were you doing?

A. I was standing there and he told me it was covered with insurance.

MR. WICKS—Object to that and make a motion to withdraw a juror and take this case from the jury.

Motion overruled.

It will be seen that the subject of insurance was first injected into the case by the cross examination of appellee by appellant's counsel and no objection was made by appellant to the answers given by him nor any motion to exclude the same. On re-direct





examinations to the answer of appellant "He is an insurance adjuster," an objection was made on the ground that he was not an insurance adjuster and this objection was sustained. No further objection was made until the last answer noted above was given. The only purpose of the questions propounded to appellant on cross examination was to show that he had made statements out of court contradictory to those made by him on the trial and thus lay a foundation for impeachment. On re-direct examination the witness had a right to testify as to the whole conversation with whom it was made and under what circumstances. If appellant did not want the subject of the insurance brought into the case he should not have asked questions, the answers to which would naturally result in such information. Having been instrumental in first introducing such testimony he is now estopped from claiming error for its introduction.

The judgment of the Circuit court is affirmed.



6595a



250 I.A. 667<sup>4</sup>

General No. 8137

Agenda No. 2

APRIL TERM, 1927

Dorothy Hakes, Plaintiff in Error.

vs.

James Garland, Defendant in Error.

Error to Macon.

NIEHAUS, J.

Dorothy Hakes the plaintiff in error was employed by James Garland, the defendant in error, who was a federal Grain Inspector, to work for him in his grain inspection office at Decatur. In the fall of 1924, after having worked for the defendant a number of years for a compensation of \$30 per week, a new arrangement as to compensation was made between the parties by which the defendant agreed to give her as compensation for the work she was doing one half of the net profits of the grain inspection business which was conducted by him; and pursuant to this agreement the defendant thereafter for several months paid her one half of the net profits of the business. After several months however, he concluded, that she was getting too much compensation for her work and thereupon attempted in March 1925, to put her back on the basis of the former salary, which she had received prior to the last agreement; but the plaintiff refused to accede to a return of the old arrangement. And after the plaintiff had repeatedly refused to accept her former salary and even a small increase thereon, the defendant discharged her about the 11th





day of May 1925. The plaintiff then commenced this suit in the circuit court of Macon county to recover the amount she claimed to be due her from the defendant as compensation under the last agreement referred to. There was a trial by jury and at the close of the plaintiff's evidence the court directed the jury to return a verdict for the defendant. Under the direction of the court the jury found for the defendant; and the court rendered a judgment in bar of the plaintiff's right to recover. A writ of error is now prosecuted from the judgment.

The principal error assigned is on the direction of the court to render a verdict for the defendant. It is insisted by the defendant, that the agreement by which the compensation of the plaintiff for her work was increased to one half of the net profits of the defendant's business, involved a contract which was illegal and void, as against public policy; and that the work which she was to perform for the compensation was in contravention of law; and therefore she could not recover for the same. Concerning the work which the plaintiff was to perform in and about the business and office of the defendant, the plaintiff in error testifies as follows:

"He ran a grain inspection office—that is, an office where we determine the grade of the grain by weight, odor, appearance, moisture tests, etc. We get our samples by sending out a grain sampler who goes out to the cars, opens them and brings back the sample. He opens the doors to get the samples, and brings them to the office for inspection. \*\*\* My duties were recording the grade, book keeping, answering the phone grading the grain. Two





people were employed there besides myself. They were samplers."

In another part of her testimony she refers to her work in the office as follows:

"My work there consists of inspecting grain, taking care of the books, doing the moisture testing, answering the telephone calls and sometimes I built the fire. I arrived at work at seven o'clock and my duties kept me late, up until after six o'clock.

And in reference to the defendant's agreement to increase her compensation, the plaintiff in error's testimony is as follows:

"I had been employed by the defendant prior to October 1924. \*\*\*\*\* I had a conversation with the defendant prior to October 1924. He said that I could take my vacation when there was practically no grain coming in, and I asked him what the arrangements were. He replied 'what do you mean?' I said, 'I will come back and help you in the office with the understanding that I get half the profits. You have given that to other people. I have been in your employ several years. You were satisfied with my work. I never have gone to any other employment that you didn't write me to return here. I will come back if you will give me half the profits for the rest of the time you are in business.' He replied, 'I couldn't take you under any other condition. I can no longer detect odors; my eye sight is poor; you know I am taking treatment all of the time, and I must either give up the office or have somebody upon whom I can depend.'

I don't remember how long this was before my vacation. We spoke of it several times. Just before I went away he asked me when I was returning. I replied, 'Whenever you send for me under the conditions I have named.' He said, 'I will write you the day I want you to come back.' I went on my vacation."

The plaintiff also testified, that the defendant wrote her to come back and she thereupon resumed her position in his office; and that thereafter the defendant paid her one half of the net profits of defendant in error's grain inspection business until the following March, when he attempted to put her back on her former salary as heretofore stated.



It is clear from the plaintiff's testimony that the relation which existed between the plaintiff and the defendant was that of master and servant; and that whatever work she did and whatever duties she performed in and about his office, and in the grain inspection business conducted by him, was performed under his direction and authority; and that she acted as his agent and servant. The Federal Grain Inspection Act under which the defendant was acting and under which he was conducting his business, does not contemplate that grain inspectors will perform all the duties and the work pertaining to the office personally; but provides, that the duties and the work pertaining to the office may be performed either by the inspector himself or by some person acting under his authority. Barnes Federal Code, Sec. 8183-8202. Nor is there anything in the Act referred to, which prescribes the nature or extent or kind of compensation which the inspector may contract to pay to the persons employed and authorized by him to assist in the performance of the various duties pertaining to the inspection and sampling of the grain. We conclude therefore, that neither the work which the plaintiff performed for the defendant nor the contract to increase her compensation, was illegal or against public policy, and that therefore, it was error to direct a verdict for the defendant. We are of opinion, that under the





plaintiff's evidence, which for the purpose of this opinion, we must consider as true, she would have a right to recover as compensation for her services one half of the net profits of the defendant's grain inspection business for the months remaining unpaid during the period of time she continued to work for him in his business, and up to the time that she was discharged from his service. For the reasons stated the judgment is reversed and the cause remanded.

Reversed and Remanded.



6895h

250 I.A. 667<sup>5</sup>

General No. 8178

Agenda No. 41

Alice C. Ogg, Appellee.

vs.

Charles R. Rice, and The Gibson Canning Company,  
Appellants.

Appeal from Ford.

NIEHAUS, J.

The appellee Alice C. Ogg brought suit in the circuit court of Ford county against the appellants Charles R. Rice and The Gibson Canning Company, to recover damages alleged to have resulted from a nuisance which the appellee charges was brought about by the use and occupation of a certain tract of land by the appellants adjoining the premises of the appellee. It appears from the evidence, that the appellant Charles R. Rice is in the live stock business; and was engaged in the business of feeding cattle for the market. By arrangement with the Gibson Canning Company, he fed a large number of cattle upon the premises referred to from the silage and refuse matter resulting from the process of canning sweet corn and other vegetable products in the canning factory which is located adjacent to the premises in question.

The declaration concerning the appellee's cause of action alleges 'that upon the said real estate of the appellee, near the Southwest Corner thereof, and within fifty feet of the





said premises of the appellants, during the whole of said period of time, there was then and is now situated the home of this appellee, consisting of a large house of eight rooms, in which home this appellee and her husband and children did then and there and do now reside; and it became then and there and was the duty of the said appellants to so use said property as not to injure this appellee in the enjoyment of her said home and premises. Yet, notwithstanding their duty in that regard, that the said appellants by themselves and their clerks, agents and servants, carelessly and negligently caused to be placed upon the premises of them, the said appellants, a large number of cattle, to-wit: one thousand head of cattle; and did cause and permit said cattle to remain upon said premises without stable or shelter in every kind of weather, including storms and wet, hot, and cold **weather**, and in all seasons of the year, to be fed upon noisome, fermenting and decaying vegetable matter, consisting largely of refuse from the canning factory; and did carelessly suffer and permit filth to accumulate upon the said premises, and to remain during the whole of said period of time; and did suffer and permit said cattle to tramp in said filth, to lie and live in said filth, and permit pools of foul and stinking water to stand in and about the said premises, in and over said filth so accumulated thereby, causing noxious vapors and stench to arise and spread over the premises, and into the home of this



appellee, to the appellee's great discomfort and inconvenience, and by means whereof vast hordes of flies were caused to accumulate and to spread over the premises, and in and about the house and home of this appellee, to the great discomfort and inconvenience of this appellee, and rendering the premises of this appellee unwholesome, and the occupation of the said premises by this appellee a source of torture and loathsomeness, and which said conditions the said appellants did carelessly and negligently permit to remain from said, to-wit: the 30th day of September, A. D. 1925, to to-wit: the commencement of this suit.'

There was a trial by jury, which resulted in a verdict and judgment in favor of the appellee in the sum of \$3985.00. This appeal is prosecuted from the judgment.

A number of errors are assigned by the appellants for reversal of the judgment; it is contended, that the court erroneously admitted incompetent evidence for the appellee and refused to admit competent evidence offered by the appellants. Also, that 'the court improperly instructed the jury for the appellee; improperly and erroneously modified certain instructions offered by the appellants; and improperly refused certain instructions requested by the appellants; and, that 'counsel for the appellee during the trial of this case and in his argument, was guilty of improper conduct, which was calculated to and did





arouse the passion and prejudice of the jury against the appellants.' It is also assigned as error, that the amount of the damages awarded by the jury is excessive. The contention of the appellants concerning the admission of improper evidence relates to the admissibility of the evidence that the appellee became sick from the unwholesome condition of the premises used by the appellants for feeding the cattle. Concerning this assignment of error the following occurred in the interrogation of the appellee at the trial:

"Q. You may state whether or not these conditions you have described had any effect upon your health, Mrs. Ogg?"

Mr. Herrick: We object to that as not competent or proper, under the allegations in the pleadings.

The Court: The only question is whether it is competent under the pleadings. I think I know the exact case you are going to submit, Mr. Dobbins. Objection overruled.

A. They did.

Q. Just describe to the jury what effect those conditions had.

Mr. Herrick: We object to it as incompetent under the declaration or any count thereof, and also as calling for a conclusion of the witness. Overruled.

A. I became so run down from these nauseating odors, that finally I was sick for two months and haven't felt well since.

Mr. Herrick: I move to exclude the answer as prejudicial and improper; and a conclusion on the part of the witness."

The Court: "It may stand."

It is apparent from the answers of the witness, that the matter of health inquired about referred to a temporary condition of the appellee claimed to have resulted from the alleged nuisance, and was a part of the discomforture and the loss of enjoyment of her home and dwelling place and claimed to have been brought about by



the unwholesome and improper condition of the premises in question, and therefore came within the purview of the damages alleged in the declaration.

Concerning the misconduct of counsel for appellee, the record discloses, that there were several statements made by counsel for the appellee that the cattle fed by appellants, 'were fed from slops and from sewer;' and that 'the stuff fed to them was rotten, and horrible stuff;' and that many of the cattle were tormented by lung fever. These remarks of counsel were not justified by the evidence. There were some other remarks made by counsel along the same lines which were not justified, nor based upon the evidence in the case; in every instance however, the court promptly sustained an objection of appellants' counsel to the improper statements of appellee's counsel. We are of opinion, that with this action of the court impressed upon them, the jury was not misled into thinking that these remarks were proper, or that they had any substantial effect on the jury in deciding the issues in the case; and the remarks of counsel, therefore, though clearly objectionable, should not be regarded as reversible error.

Concerning the error in the instructions, it is contended that the 10th and 11th instructions were erroneous. In the 10th and 11th instruction the jury were told, that they had a right to take into consideration the evidence of discomfort and suffering





resulting to the appellee which would include discomfort and suffering as a result of the appellee's sickness in assessing the appellee's damages. For the reason hereinbefore stated, we are of opinion, that the instructions were not erroneous. If the appellee became physically run down and temporarily sick from the nauseating odors from the effects of the alleged nuisance, this may justly be regarded as a part of the discomforts and injuries to the enjoyment of the premises which she suffered during the continuance of the alleged nuisance; and therefore would be a proper matter to be taken into consideration on the question of fixing the amount of damages.

It is contended, that appellee's given instruction No. 2 authorizes the jury to assess damages to the real estate. We do not regard the instruction as subject to the criticism made. It is contended, that appellee's instruction No. 3 is erroneous, because it refers to the matter used for feeding the cattle taken from the canning factory, as 'waste matter.' We do not perceive any impropriety in the designation of the matter used for feeding, as 'waste matter;' and the instruction is a substantially correct statement of the basis of the appellee's right to recover damages. The appellants also complain of appellee's instructions numbered 5, 7 and 9 because they 'tell the jury that if they find the appellants or one of them guilty of maintaining a nuisance,



as defined in other instructions, then the appellee would be entitled to recover. That there was no instruction given for or on behalf of either party defining what is a nuisance.' The record discloses, that in appellee's instruction No. 4 the court defined the nuisance relied upon by the appellee as a basis for recovery in this case. It may also be pointed out that if there was any error in this feature of the case, the appellants were guilty of the same error in Instruction No. 1 which was given to the jury at their instance.

We find no error in the modifications made by the court of the appellants' instructions; nor in the refusal of instructions requested by the appellants. While there were some matters in the refused instructions which the appellants were entitled to have given, these matters were already embodied in instructions which were given by the court at their instance. And it may be pointed out with reference to appellants' refused instructions that refer to the matter of punitive or exemplary damages, that there was no claim made by the appellee for the recovery of punitive or exemplary damages; and there was no question raised concerning speculative or conjectural damages; and therefore the instructions on these points requested by the appellants were not pertinent and properly refused.

The contention of the appellants however, that the damages





allowed by the jury are excessive must be sustained. There is no permanent injury claimed nor proven in the matter of the damages; nor any permanent injury to the enjoyment of her habitation; the declaration limits the discomforts inconveniences and interference with the enjoyment and comforts of her property and home to a definite period of time, namely, from the 30th day of September 1925 to the commencement of this suit, which was October 1, 1926, which would be about a year. In this condition of the record, the verdict which is practically for \$4000.00, appears to be in excess of what would be adequate compensation under the evidence; and we conclude, that one half of the amount allowed by the jury would be a fair and substantial amount of damages to be recovered by the appellee for the temporary injuries and discomforts suffered by her. For the excessive amount of damages recovered the judgment will be reversed; unless the appellee will consent to a remittitur to reduce the amount of her damages to the sum of \$2000.00. It is therefore ordered that if the appellee will within ten days after the filing of this opinion enter a remittitur as indicated, that the judgment stand affirmed for the sum of \$2000.00; otherwise, that the judgment will be reversed and the cause remanded for the reasons stated.



6895  
✓ 250 I.A. 668<sup>1</sup>

General No. 8193

Agenda No. 11

Ella C. Coleman, Appellant.

vs.

John E. Mulcahey, Katherine Mulcahey, Charles E.  
Coleman, Trustee, Lucy Mulcahey, Melvin State  
Bank, Commercial State Bank of Melvin,  
William R. Bach, W. E. Thompson,  
Appellees.

Appeal from Ford.

NIEHAUS, J.

In this case a bill in equity was filed by Ella C. Coleman in the circuit court of Ford county to foreclose a trust deed as a first lien on the premises described therein. In the course of the foreclosure proceedings E. D. Cameron was appointed receiver by the court by virtue of the provisions of the trust deed which was foreclosed, to collect the rents issues and profits accruing from the premises; and the receiver took possession of the premises and collected rents which amounted to the sum of \$2293.26. After the foreclosure and sale of the premises and the expiration of the redemption period, the receiver made his report showing the amount mentioned to be on hand, subject to the order of the court for distribution. Lucy Mulcahey as owner of the equity of redemption claimed the money in the receiver's hands remaining from the rents collected and filed a motion to have the same turned over to her; Ella Coleman the complainant in the foreclosure proceedings at whose instance the





receiver was appointed, also filed a motion claiming the net rents under the provisions of the trust deed which had been foreclosed under her deficiency decree, which had been rendered in her favor for the sum of \$3189.98; and asked the court to apply the amount remaining in the receiver's hands in part satisfaction of this deficiency.

There was a hearing on the motions and thereupon the court entered the following decree:

"This cause coming on to be heard on the report of E. D. Cameron, Receiver, and the Motions of Ella C. Coleman, one of the Complainants, and of Lucy Mulcahey, one of the Defendants, in said cause, and the Court having examined said report of said Receiver and said Motions, and having examined the Stipulation of the Parties made in open Court and the Record in said cause, and having heard the argument of Counsel and being fully informed in said cause Doth Find That said Report of said Receiver and his actions as such Receiver are all in strict conformity with the law and the order appointing said Receiver, and that by agreement of the parties the sum of Two Hundred Forty (\$240.00) Dollars is the usual, customary and reasonable fees for the services rendered by such Receiver.

The Court Doth Therefore Order, adjudge and Decree That such Receiver's report be and the same is hereby approved and that such Receiver be authorized to pay to himself the sum of Two Hundred Forty (\$240.00) Dollars for his reasonable compensation as such Receiver; and that the balance of monies in the Receiver's hands, as shown by said report, less the said commissions and fees of such Receiver viz: Two Thousand Fifty-three and 26-100 (\$2053.26) Dollars, shall be paid as hereinafter directed.

The Court doth further find that on March 21, 1925, the Complainant filed her bill to foreclose her mortgage and a decree of foreclosure was entered in this case on the 14th day of September, 1925, directing the Master to sell, at the end of fifteen months if not redeemed, the following real estate. The South Half ( $\frac{1}{2}$ ) of the North west Quarter ( $\frac{1}{4}$ ) and the North Half ( $\frac{1}{2}$ ) of the Southwest Quarter ( $\frac{1}{4}$ ) of Section 22, 25-8.

The Court doth further find that the Master sold the premises on the 5th day of February, 1927, to the complainant for the sum of \$28000.00. This was \$3189.98 less than was due her. This sale was approved on February 24, 1927, and a deficiency decree entered against the defendants, John E. Mulcahey and Katherine Mulcahey, the signers of the mortgage, for the sum of \$3189.98. On March 9, 1925, John E. Mulcahey and Katherine Mulcahey



executed a warranty deed to Lucy Mulcahey for the above described tract of land which was recorded on April 3, 1925. Lucy Mulcahey, the Grantee in the deed, did not assume or agree to pay the mortgage. The deed only conveyed the equity of the Grantors to her. The said Lucy Mulcahey was, at the time of filing of the bill and still is the owner of the equity of Redemption.

On April 18, 1925, the Court appointed E. D. Cameron, Receiver, to take charge of the profits and rents from said real estate, and to hold the same subject to the order of the court.

That the Receiver has filed his reports showing some disbursements and a balance of \$2293.26, now in his hands, less whatever is allowed to him for his services.

That on January 8, 1927, Lucy Mulcahey filed a written motion asking that this money now in the hands of the Receiver, less his expenses and fees, be turned over to Lucy Mulcahey the owner of the equity of redemption, at the time the bill was filed, and who still is such owner. The cross-complainant in the suit, William R. Bach, expressly consenting to such motion and order.

That on February 24, 1927, Ella C. Coleman filed a written motion asking the court to enter an order directing the Receiver to pay the balance of this money in the hands of the Receiver less his fees and expenses on the deficiency decree to her.

That the trust deed under which the foreclosure proceeding was had, did not pledge the rents and profits issuing out of the land either before or after foreclosure. The provision in regard to the rents is, "and agree that upon the filing of any bill to foreclose this trust deed, a receiver shall and may at once be appointed to take possession or charge of said premises, and collect such income, and the same, less receiver-ship expenditures, including repairs, insurance premiums, taxes, assessments and his commissions, to pay to the person entitled to a deed under the certificate of sale, or in reduction of the redemption money, if said premises be redeemed."

That the trust deed provides that this money shall be paid to Ella C. Coleman as purchaser and not as owner of the deficiency decree. That when Ella C. Coleman purchased this land, she, as purchaser, held under the decree and not under the trust deed and after the sale, as purchaser she was entitled to the rights conferred upon her by statute, which, were a deed to be issued to her by the Master and a right to be placed in possession of the premises.

That Lucy Mulcahey did not sign the trust deed. Neither did she sign the notes. She did not assume and agree to pay this trust deed. She was at the time of filing the bill and still is the owner of the equity of redemption.

That this Receiver was appointed upon Motion of complainant under a prayer contained in the bill.

That no proof of scant security or insolvency on the part of the signers of the note was made in this case. That under the agreement of the Trust Deed this rent could be used to pay the following: Receiver's fees, repairs, insurance and taxes.





It is Therefore Ordered, Adjudged and Decreed That the net rents in the hands of E. D. Cameron, the Receiver, after payment of the Receiver's fees, viz: Two Thousand Fifty-three and 26-100 (\$2053.26) Dollars, are the property of Lucy Mulcahey, the owner of the equity of redemption.

It is further ordered that said Receiver forthwith pay said sum of two Thousand Fifty-three and 26-100 (\$2053.26) Dollars to Lucy Mulcahey."

From this decree the appellant Ella C. Coleman is prosecuting this appeal.

The errors assigned in reference to the rendition of the decree appealed from are, that the court erred in finding, that the trust deed under which the foreclosure proceedings were had, did not pledge the rents and profits issuing out of the land to the holder of the indebtedness; and that the court erred in ordering the net rents paid to Lucy Mulcahey, who was the owner of the equity of redemption in the premises; and that the court erred in not ordering the amount in the receiver's hands paid to the appellant to apply on her deficiency decree. It is apparent that the decree sought to be reversed is in part based upon a stipulation of the parties made in open court at the hearing of the motions; and there is no certificate of evidence to show what that stipulation was; nor to show to what extent the action of the court was governed by the matters included in the stipulation. In this state of the record, this court can only review the action of the court below from the facts found by the court in the decree **Van Meter v. Malchef** 276 Ill. 451 From the facts found by the



court in the decree, we are of opinion, that the court properly ordered the money remaining in the hands of the receiver to be paid over to the owner of the equity of redemption. The decree is therefore affirmed.

Affirmed.





7055a  
250 I.A. 668<sup>2</sup>

General No. 8210

Agenda No. 7

APRIL TERM, A. D. 1928

R. A. Hennings, Appellee,

vs.

The Chicago and Eastern Illinois Railroad Company,  
Appellant.

Appeal from Shelby.

NIEHAUS, P. J.

In this case the appellee R. A. Hennings sued The Chicago & Eastern Illinois Railroad Company, appellant, to recover damages occasioned by the killing of his cow by appellant's train near the city of Shelbyville. Appellee commenced this suit in a justice court; and on appeal the case was tried in the circuit court of Shelby county. The trial resulted in a verdict and judgment against the appellant for \$135. This appeal is prosecuted from the judgment.

The evidence tends to show, that the cow in question was killed by getting on appellant's track and thereby coming in collision with appellant's train at or near a highway crossing located at the westerly limits of Shelbyville; and the right of recovery is based on three distinctive grounds; first, that there was no cattle guard at the crossing in question; and no fence across appellant's right of way to prevent cattle from getting on to the appellant's right of way and thereby on the railroad track. Secondly, that appellant's servants in charge of the train



which killed the cow were guilty of negligence in failing to give the statutory signals of warning of the approach of the train to the person in charge of the cow; and thirdly, that the train was run at an excessive rate of speed without regard for the safety of the public using the crossing in question. It is a controverted question in the case, where the line marking the corporate limits of Shelbyville is located with reference to the line of right of way of the appellant railroad and the crossing in question. The evidence does not definitely establish the line. The only witness who testified concerning this matter stated merely: "I presume that east of the right of way line of the C. & E. I. Railroad is about the corporate limits." It was also a controverted question as to whether the cow was struck by the train on the crossing or some distance south of the crossing. Albert Morris, who was working for the appellee, and who was in charge of the cow at the time she was killed, testified with reference to the occurrence as follows: "On the 21st day of December 1926 I was driving the cattle, I went after them that night. I went up to the Biven farm to get the cattle I was to drive. That is old Doctor Biven's farm north and east of Shelbyville. I drove nine cattle from the Biven's farm that evening. I judge I got these cattle about half past four in the evening. I drove them west from the Biven's farm. In driving them west, I drove them along the public highway that





intersects the C. & C. E. Railroad north of Shelbyville. It was between half past four and twenty minutes to five when I came along the highway. \*\*\* It was dusk. It was daylight, I could see. I could see all right. I didn't see a train from the north on the C. & E. I. Railroad on that evening until it pretty nearly got to the crossing. I have had occasion to cross that crossing a good many times, I have always crossed it, I always cross it bringing the cows out in the morning and taking them back. Coming from the east, you cannot see a train any appreciable distance up to that track at a point east of the ticket office. There are a big row of cottages there about even with the ticket office. After you pass the ticket office you could see north down the railroad. On this particular evening I was by the ticket office, at the road that goes in the park, after you cross the railroad track when I first discovered that train. After I had passed the ticket office and got to the road that goes in the park, I noticed the train coming. They did not sound any whistle, and there was not any bell ringing. I heard the roar of the train coming is how I happened to notice the train. I was horse back, on a pony. When I observed this train, I judge this train was about 25 or 30 feet north of the crossing. I tried to head my cattle off, and one went one way and one went the other, up the track. One went north and one went south up the right of way. They were



on the east side of the railroad track. This cow that was killed went south. She got on the right of way right below the corner of Mr. Culb's yard there. She run down the right of way, and I was between her and the train, and just as the train got even with her she run in front of the train, and the train hit her. That was a passenger train on the C. & E. I. Railroad. I dont know exactly what distance south of the highway running east and west, this cow was hit. I never measured it. My best judgment about it would be about 17 foot, I guess. I mean steps when I say foot. The train just hit this cow and knocked her down the railroad track. It tore her bag off and her hind leg, and killed her. At the time I was between her and the train, and then she turned and run in front of the train. The train struck the pony and it wheeled and jumped and saved us both. The pony had the hide knocked off of it's hip."

The principal errors assigned for reversal of the judgment have reference to the instructions given for appellee, namely, instructions numbered 2 and 4, and appellee's 1st and 2nd modified instructions. These instructions are as follows:

2. The jury are further instructed that while there is no fixed rate of speed at which a railroad may operate its train across an intersection of its railroad with a public highway, still the law does require that said railroad company shall at all times exercise due care and caution for the public safety in the operation of its trains, and that with reference to the speed of trains at such intersections of said railroad with public highways that the speed of such trains shall be such as shall not endanger





the public safety and shall not exceed that rate of speed as is reasonably safe and proper with due regard to the public using said intersection, and in this case if you believe from the evidence that the defendant railroad company ran its train at a greater rate of speed than was reasonable and proper with due regard to the use of the intersection in question, at the time in question, and that as a result of such excessive rate of speed at which the train in question was operated, the cow of the plaintiff was struck and killed, and that such excessive rate of speed was the proximate cause of such striking and killing, and if you further believe from the evidence that the servant of the plaintiff in charge of said cow was in the exercise of due care and caution for the safety of said cow at the time of such striking and killing, then and in such case the plaintiff is entitled to recover the value of said cow and you should so find by your verdict.

4. You are further instructed that it is the duty of a railroad company whose road runs through or near a city or village to run its trains while in or near such city or village at such rate of speed as to have them under control, so as to be able to avoid injury to persons or property, and if it fails to do so it is guilty of negligence.

1. You are further instructed that the laws of this State require that every railroad corporation shall cause a bell of at least thirty pounds weight, and a steam whistle placed and kept on each locomotive engine, and shall cause said bell to be rung or said whistle to be blown by the engineer or fireman at the distance of at least eighty rods from the place where the railroad crosses or intersects the public highway and shall be kept ringing or whistling until such highway is reached, and in this case if you believe from a preponderance of the evidence that the servants of the defendant railroad company in charge of the train which struck and killed the cow in question, failed to ring such bell or blow such whistle continuously from a point eighty rods away from said crossing until said crossing was reached, and that such failure to ring said bell or blow such whistle was the proximate cause of the striking and killing of said cow, then under the law the defendant is guilty of negligence and the plaintiff is entitled to recover the value of said cow as shown by the evidence.

2. The jury are further instructed that if you believe from a preponderance of the evidence in this case that the cow of the plaintiff, while being driven along a public highway in this State and at the intersection of said public highway and the railroad of the defendant corporation, the said cow got on to said railroad at a place outside the corporate limits of Shelbyville or outside such portion of said city as is platted into lots and blocks, where the law requires said defendant railroad company to keep and maintain suitable cattle-guards and fences to prevent live stock from getting onto its said railroad as explained in these instructions, and by reason of there being no cattleguards or fences at said intersection wandered down said railroad and away from said public highway and was thereafter and while on said railroad and away from said intersection, struck and killed by the train of defendant, then and in such case the plaintiff is entitled to recover from the defendant railroad company damages for the loss of said cow and entitled to recover also such reasonable attorney's fees as may be shown by the evidence.



All these instructions have reference to the rate of speed which is legally permissible in railroad operations; and it is evident that instruction number 2 does not correctly define the railroad's company duty with regard to such rate of speed at which it may operate its trains, and is erroneous in that the care and caution required of appellee's servant in looking after the cow's safety is limited to the time of the striking and killing of the cow. In this instruction the jury were told that "the law does require that said railroad company shall at all times exercise due care and caution for the public safety in the operation of its trains, and that with reference to the speed of trains at such intersections of said railroad with public highways, that the speed of such trains shall be such as not to endanger the public safety, and shall not exceed the rate of speed as is reasonably safe and proper, with due regard to the public using said intersection, and in this case if you believe from the evidence that the defendant company ran its train at a greater rate of speed than was reasonable and proper with due regard to the use of the intersection in question at the time in question, and that as a result of such excessive rate of speed at which the train in question was operated, the cow of the plaintiff was struck and killed, and that such excessive rate of speed was the proximate cause of such striking and killing, and that the servant of the plaintiff in charge of said cow was in the exercise of due care





and caution for the safety of said cow at the time of such striking and killing, then in such case the plaintiff is entitled to recover."

The legal duty of exercising care in the running of trains across highway crossings at a rate of speed which will have due regard to the safety of persons lawfully using such crossing is based on the legal requirement, that the person so using such crossings shall be in the exercise of ordinary care themselves in using such crossings. This necessary element in the definition of the care with regard to speed was not embodied in the instruction, and the instruction is therefore fatally defective. **Partlow v. I. C. R. R. Co.** 150 Ill. 321; **C. & N. R. R. Co. v. Dunlevy** 129 Ill. 151; **I. E. & W. R. R. Co. Hall** 106 Ill. 375; The instruction is also erroneous because it requires due care to be exercised by the driver of the cow only at the time of the striking and killing of the cow. **North Chicago Str. R. R. Co. v. Cossar** 203 Ill. 608; **Krieger v. A. E. & C. R. R. Co.** 242 Ill. 544; **C. M. & St. P. R'y. Co. v. Halsey** 133 Ill. 248; **P. & P. U. v. Herman** 39 Ill. App. 287.

It is apparent that instruction numbered 4, places upon the appellant company a greater duty in the operation of its trains which are run through or near a city or village than the law requires and as emphasized in the authorities above cited. It must be pointed out concerning the first and second modified instructions



given for the appellee that in each of them the necessary element in appellee's right of recovery, namely, that the driver of the cow was in the exercise of due care for the safety of the cow at and just before she was struck and killed, is omitted; and that the instructions are therefore also erroneous. **C. B. & Q. R. R. Co. v. Harwood** 80 Ill. 88; **C. & N. W. R'y. Co. v. Dimick** 96 Ill. 42; **Dannenberg v. Rahn** 206 Ill. App. 414; **I. C. R. R. Co. v. Trowbridge** 31 Ill. 190.

For the errors indicated, judgment is reversed and the cause remanded.

Reversed and remanded.





7056a

250 I.A. 668<sup>3</sup>

General No. 8239

Agenda No. 31

APRIL TERM, 1928

William R. Nickelson, Appellee.

vs.

William E. Atherton, Appellant.

Appeal from Sangamon

NIEHAUS, P. J.

This is an appeal from a judgment for \$3500.00 recovered in the circuit court of Sangamon county in favor of the appellee William R. Nickelson against William E. Atherton, appellant. The amount recovered is for damages to the appellee for personal injuries suffered by him, and damages to his wagon, resulting from a collision with the appellant's automobile while appellee was driving along a paved public highway near Bradfordton.

The declaration charges that the appellant drove his automobile west on the highway in question and approached appellee's wagon from the rear; and that he was driving at a high and dangerous rate of speed; and that in attempting to turn around and pass the appellee's wagon, the appellant so negligently and carelessly drove and managed his automobile, that it ran into and struck the appellee's wagon with great force; and that in consequence thereof the appellee was thrown from his wagon on the ground and greatly bruised and wounded; and his wagon was damaged, etc.

The appellee testified on the trial of the case concerning the occurrence as follows: "The morning of the accident I had



been to the West End Coal Company to get a load of coal. I had a heavy coal wagon drawn by a team of horses, owned by myself. Horses were about eleven and twelve years old. The running gears of the wagon were in good condition, the bed was an old bed. The road from West End mine to Bradfordton is a paved road. It is a State road, paved with cement and brick. On the pavement was a middle black line. It was a cold chilly morning, and was snowing a little. About a half and a quarter of a mile east of the B. & O. crossing, I stopped and talked with a boy that was shucking corn, for about a minute or two. His name was Harold Herman. Up to the time I was talking to him, I had been walking behind the wagon for a half a mile or so. \*\*\* I got on my wagon, which was on the north side of the black line, I started on, the horses were walking and it was snowing a little. I observed automobiles coming both ways. \*\*\* I noticed a Ford Coupe in front, start to get off the hard road and I looked to see what he was—he was coming east and I was going west, and he cut off to the side of the road. He (appellant) was to the south and I looked around at him at the time the Ford Coupe got off the side of the road, there were two cars, one car following the Ford Coupe. I do not know who was in the Ford. In the other car was Noel Parker. I looked around back of me to the east to see why he was getting off the pavement. I saw Atherton's car coming right cross ways of the road, right at





me, at the time I looked around. Judging from the distance, when I first saw Atherton's car and first saw these other cars, he was coming around 40 to 45 miles an hour . \*\*\*\* At the time I looked around and saw Atherton's car coming, it was just at the rear end of my wagon. His car was on the left hand side of the road and practically coming cross ways right at me. My horses were then going in a walk. He dashed into the load of coal and knocked it off the hard road, broke the coupling pole and the crash threw me off when he hit the load of coal."

Harold Herman a witness called for the appellee, testified in reference to the collision as follows: "I was in the field north of the road, close to the road, about 30 feet off the hard road. He (the appellee) was walking behind the wagon, but he stopped and got on the wagon and talked to me and moved on. His wagon was on the north side of the cement strip, the closest side to me. All four wheels were on the cement strip. He was going on down the road perhaps 150 feet from me when I heard a car. It was a large touring car coming along at a pretty good rate of speed. I have driven a car four or five years and am pretty familiar with the speed at which automobiles run. I was standing in the field close to the fence. The car was on the cement. I would say the car was driving about 35 miles an hour. I watched the car. I thought he was going to stop behind the wagon. He had plenty



of time, and instead of that he whipped out to go around the wagon, but instead of going around, he ran into the wagon. I didn't see him slack down or go any faster. After the car hit the wagon, it seemed as though it threw the rear end of the car around and that left the car perhaps—the car seemed like it glanced back away—after it hit the wagon it knocked it away from the wagon to go around it and knocked it off the road. That left it standing straddle of the black mark with the nose pointing to the north. When the car hit the wagon it throwed Mr. Nickelson off. He lit on the north side just like he lit all in a bunch. The team dragged him a little bit. I should judge 15 or 20 feet. He didn't get on his feet until the team got clear away from him and was running."

Concerning the injuries suffered by the appellee, in the collision, Dr. George G. Harvey testified as follows: "I found a fracture of the tibia, that is the large bone of the right leg. The fracture begun about 2 or 2½ inches above the joint and extended into the joint. The ankle joint. The limb was greatly swollen and discolored. The patient was suffering pain, of course. I put it in a big hot pack immediately in a big splint to take down the swelling. It was about a week before I was able to cast the limb. At the end of the week I put on a plaster paris cast. He was in the hospital near five weeks. I have seen him off and on since then in the office. I have seen him within the last week.





There is still some swelling in the joint. Fractures as a rule run into the joint capsule and break the joint capsule, such as this was. Generally get an enlargement of the joint and get a limitation of movement of the joint. That condition will supervene permanently to some extent. He could move it better now than he could a year ago. It will never be as well as the other leg."

The main contentions made for reversal of the judgment are that the verdict is contrary to the manifest weight of the evidence; that there is error in the instructions given for the appellee; and that the court erred in refusing a number of instructions which the appellant requested to be given.

The evidence however clearly tends to support the averments of the declaration concerning the alleged negligence of the appellant; and there is no merit in this contention. The instructions given for the appellee are substantially correct in stating the issues involved in the case and the law applicable to them; nor is there any error apparent in the refusal of the instructions tendered by the appellant; the instructions given for appellant covered all the points of defense which the appellant was entitled to have presented to the jury under the issues.

The record does not disclose any reversible error, and the judgment is therefore affirmed.

Judgment affirmed.



7057a  
250 I.A. 668<sup>4</sup>

General No. 8223

Agenda No. 17

APRIL TERM, A. D. 1928

Edith Lane, Executrix, et al, Appellants,

vs.

Verna V. Edwards, et al, Appellees

Appeal from Circuit Court, McLean County

ELDREDGE, J.

In the Circuit court of McLean County a demurrer was sustained to a bill of complaint filed by appellants. The bill was filed to construe a will and to determine the legal possession and liability in regard to certain notes. That portion of the bill which seeks a construction of the will as abstracted is as follows:

"That Edith Lane, Verna V. Edwards and Imo E. Sackett are the sole heirs and persons named in will of Mary M. Thrush who died testate March 10, 1924; that by the 2nd paragraph of her will she gave to her two granddaughters Verna V. Edwards and Imo E. Sackett under the name Verna V. Sackett and Imo E. Sackett a certain real estate mortgage dated December 9, 1920, securing \$12,000.00 recorded December 10, 1920, in Book 271 of Mortgages, page 21 McLean county record, etc. The third paragraph of the will of testatrix devises and bequeaths to her "beloved daughter Edith S. Lane all the residue and remainder of my property both personal and real of every kind and character wherever the same may be found or located which I may own or be possessed of or entitled to at the time of my decease to have and to hold the same for her own use and behoof for ever," etc.

Complainants represent that a controversy has arisen as to what passes and belongs to the defendants or either of them by and under the will and that because they cannot agree and because of the language of the testatrix being uncertain as to what was given to each of the respective parties it is impossible for complainants or the executrix of the said will to settle and complete the administration of the estate without a construction of the will as what property passed to the defendants and to Edith Lane respectively by the terms thereof."





We can discover no ambiguity in regard to the terms of this will. In fact, none are pointed out or suggested in the brief and argument for appellants. In regard to the other portion of bill which asks a court of equity to settle and determine the legal rights of certain parties and in regard to certain notes the matters in controversy are primarily such as must be settled by the Probate court or in appropriate actions at law and do not call for the intervention of a court of equity.

The decree of the Circuit court sustaining the demurrer to the bill is affirmed.

Decree affirmed.



7058a

250 I.A. 668<sup>5</sup>

General No. 8227

Agenda No. 20

APRIL TERM, A. D. 1928

Sarah Ross, Appellee,

vs.

Ernest M. Sparks and Nancy J. Sparks, Appellants.

Appeal from Circuit Court of Champaign County.

ELDREDGE, J.

This is an action of trespass **vi et armis** in which a jury returned a verdict against Ernest M. Sparks and Nancy J. Sparks, appellants, for the sum of \$2500. The trial court required a remittitur of \$533.00 and judgment was rendered against appellants for \$1967.00 and costs. The declaration consisted of two counts, the first charging assault with force and arms on July 6, A. D. 1927, by means of which the plaintiff was then and there greatly hurt, bruised and wounded and became and was sick, sore, lame and disordered and so remained for a long space of time, to-wit, hitherto, during all of which time the plaintiff thereby suffered great pain and was hindered and prevented from performing and transacting her affairs and business, and also was obliged to and did necessarily lay out divers sums of money amounting to \$500.00, in and about endeavoring to be healed of said bruises, wounds, sickness, soreness, lameness and disorder,





as aforesaid. The second count charges an assault with force and arms and that defendants then and there beat, bruised, wounded and ill-treated plaintiff and other wrongs to the plaintiff then and there did against the peace of the People of this State and to the damage of the plaintiff of \$10,000.00.

The plea was a general issue with notice of special defenses.

Appellee, who was the plaintiff in the suit, was a practical nurse, forty-eight years of age and lived with her son, John, fifteen years of age, at Urbana, Illinois. Her lot adjoins that occupied by appellants. She supported herself and son by nursing and also by renting some of the rooms in her house to others. There was a wire fence between the two lots. The two appellants were husband and wife. Appellee testified, in substance, that on July 6, 1927, she went into her garden to pick spinach and noticed that a ladder which had been laid against a post of the fence the night before was lying on the ground. She picked it up and laid it against the post of the fence; as she was picking the spinach the ladder was pushed down and when she had finished filling her kettle with spinach she put the same on the well curb, went to the ladder and started to remove it, when Mr. Sparks said "I will get



the ladder," and when she had raised it about half way from the ground he took hold of it and pushed it into her side, and at the same time kicked her on the right leg and stamped with his foot on the top of her foot through the fence. By that time Mrs. Sparks reached the fence and Mr. Sparks stepped back; Mrs. Sparks grabbed her by the back of the head and beat her across the back of the shoulders and the side and down the back; pulled her bonnet off, secured hold of her arms around the post of the fence and beat her about the ears, the head, in the eyes, knocked her glasses off and beat her on the chest and side and kicked her in the right side; Mrs. Sparks called her a devil a number of times, accused her of being indecent, of being a thief and a liar and of stealing her flowers. During this time Mr. Sparks stood behind her and said "Good. Give her more," a number of times. Her son John called the motorcycle policeman who came and separated them and appellee fainted. Prior to the assault she had been in good health, had earned \$5.00 a day as a nurse for about nine or ten months each year. Since that time she has been constantly under the doctor's care and has been treated by Dr. Way, Dr. Mason and Dr. Honn. She is nervous and has constant vomiting attacks night and day; is unable to sleep, is not able to use her right arm freely and can-





not nurse because she cannot lift a patient with her disabled arm. Since that time she has only been able to work three weeks and four days. Dr. Way attended her at her home seven times and at his office five times. Dr. Mason attended her at her home twice and at his office five times. She is more or less corroborated in her testimony by the witness John Ross and Mr. and Mrs. Frank Allen, who had rooms in her house at that time.

Mrs. Sparks testified, in substance, that she was fifty-two years old and that prior to the occurrence she called on Mrs. Ross, who was lying in bed in the west room of her house and very sick. That Mrs. Ross told her at that time that she was suffering with a floating kidney and she had been vomitting. At another time Mrs. Ross came to her house and said she had to move some heavy furniture and was unable to do so on account of her having a floating kidney and that she told her a number of times prior to the alleged assault that she had a floating kidney. She further testified that her husband built the fence between the two lots; that she and her husband had planted peas and beans along the fence; that at the time in question the peas and beans had grown up on the fence and eight or ten inches above it; that on the day in question she went into her yard to water her flowers and saw a



ladder ten or twelve feet long with one end against a post in the fence and the other end in the pea vines on the fence and it was pushing the wire fence inward; she pushed the ladder off the fence and it fell into the grass; that Mrs. Ross thereupon ran up with a kettle in her hand with spinach in it and a paring knife; that the latter set the ladder up again and she pushed it off the fence the third time; that Mrs. Ross then held the ladder and laid her back into the vines rubbing up and down and tearing them loose from the fence and breaking them off at the roots; that she said to her "Don't tear up my vines"; Mrs. Ross replied she would do as she pleased and put the ladder there when she wanted to; that Mrs. Sparks shoved her away from the fence four times by "putting my hands against her shoulders and pushing her"; that Mrs. Ross put up her left arm over the post still holding the kettle and the knife in the right hand; that she shoved her arm off the post ten or twelve times; that Mrs. Ross struck her with the kettle and the knife and Mrs. Sparks grabbed her left arm and stood at arm's length so that Mrs. Ross couldn't hit her with the knife; that Mrs. Ross kicked at her a number of times; that Mr. Sparks was not there at that time, but was in the dining room shaving and came out later and did not touch Mrs. Ross at any time; that she





asked her husband to get the police and he went out in his car; that she did not strike Mrs. Ross at any time except when she pushed her away from the fence; that Mrs. Ross struck her and scratched her hands badly.

Mr. Sparks testified that he came into his yard that morning and saw the ladder on the west side of the fence one side leaning against the post and the other against the wire, crushing the beans and peas. The ladder was ten or twelve feet long and he pushed the ladder down with his toe, went into the house, got some water to water his flowers and when he came out into the yard again he found the ladder up against the fence again and pushed it down the second time and that Mrs. Ross did not replace it against the fence while he was in the yard; that he then went back into the house to shave and afterwards heard an altercation between his wife and Mrs. Ross, came out and found Mrs. Ross standing at the fence with her arm over the fence around the top of the post above the ladder and hooked around the post; that Mrs. Sparks pushed her arm off three or four times and she would put it back; that Mrs. Sparks told her she wanted her to leave the fence and her property alone; Mrs. Ross lunged at Mrs. Sparks with a knife and bucket over the fence and tried to strike her three or four times;



Mrs. Ross dropped her knife and bucket and went to scratching Mrs. Sparks and three or four times rubbed her back against the fence along the vines and Mrs. Sparks pushed her out. The fence was woven wire with meshes about five or six inches wide; Mrs. Sparks asked him to get the police and he went to the office to get them; that he did not hit Mrs. Ross with the end of the ladder and didn't even touch the ladder with anything but his foot and that at that time Mrs. Ross was fifteen feet away; did not kick Mrs. Ross or strike her; Mr. and Mrs. Sparks are more or less corroborated by the witness Laura L. Logan, who was living in the home of appellants at that time.

Dr. George W. Way testified that shortly after the alleged assault he was called and examined Mrs. Ross and found her very nervous, that practically her entire right side was bruised and there were bruises on her face, her shoulder, breast and right leg below her knee and on top of her foot over the instep, her ears were both bruised and cut and there was a cut on her left hand and her arms were badly bruised as was also her chest; that she had considerable tenderness over the right side just below and over the base of the ribs and along the hypo chondriac region; saw her the next day and she was practically in the same condition





and gave her something to quiet her nerves and hot applications over the bruised areas and treated the wounds with proper antiseptics; Dr. Mason was with him the second time he saw her; think he saw her four or five times after that at the house and she has been to the office a number of times. Dr. Way was asked this question: (Q) "What is your professional opinion as to her condition, what did you find as a result of those examinations?" to which he answered "Of course the wounds and lacerations were entirely healed and there seems to be a condition in the right shoulder, the muscles of the right arm still seem to be quite sore and tender yet, and there seems to be a tenderness over the right kidney area corresponding to the tenderness and soreness at the time of the injury on the sixth of July." Also, (Q) "What condition other than you have already stated, exists in regard to the kidney at the present time? (A) She has a floating kidney on the right side. (Q) Assuming that the plaintiff was kicked and being on the right side of the stomach, kicked or beaten on the right side of the stomach, in your professional opinion would the condition you have described, the floating kidney, be the natural and probable result of that kicking or beating; "Surely, yes, sir." The last question was objected



to as being incompetent, improper and calling for a conclusion not based on any reasonable hypothesis in the evidence.

After testifying that the condition would yield to treatment he was asked the following question, which was objected to: "(Q) What, in your professional opinion would that treatment be? (A) The treatment would be first a palliative treatment, that is, by that I mean treatment to avoid an operation, rest and applying of tight bandages, like a corset, giving her a very liberal diet of carbohydrate foods, trying to put on fat, trying to hold the kidney back by that means. Of course, you would have to have treatment to allay these pains. If that didn't suffice and she still had these pains, why, the next step would be an operation to attach that kidney back to its original location where it should be. (Q) have you a professional opinion as to whether an operation will be necessary considering your examination of this witness or of this plaintiff, (A) Yes, an operation would be the only thing that would relieve her. (Q) I will ask you, Doctor, if in your professional opinion—if you have a professional opinion as to whether the floating kidney found in Sarah Ross can be cured? (A) To say absolutely that it can be cured, I wouldn't say that she can be absolutely cured, because—(Defendants object to





the reason. Overruled.) (A) Take for instance a palliative treatment, if that does not suffice, which it doesn't seem to be, then the next thing would be an operation, and we can't guarantee an operation, she may die during the operation or— (last part of statement excluded on motion of defendant). (A) All you can do is the best you can but to guarantee an absolute cure it is impossible. (Q) I will ask you, Doctor, if your professional opinion an operation is necessary to effect a cure of the condition found to exist in Mrs. Sarah Ross? (A) I feel that is the only recourse, yes, sir."

The witness was then permitted, over objection, to give a detailed account of the expenses of such an operation, to-wit, charge for operating room, \$10.00; for private room in a hospital, \$40.00 per week; for giving of an anesthetic, \$15.00; for an assistant attending the giving of an anesthetic, \$50.00; for a surgeon's fee, \$250.00; for a trained nurse, \$49.00 a week and \$1.00 a day for her board for a period of three weeks.

On the motion for a new trial the trial court ordered a remittitur of the above operating expenses.

It is assigned as error that the whole testimony of Dr. Way in regard to the necessity for an operation is purely specula-



tive and incompetent. It will be noticed that Dr. Way, in stating what the proper treatment for plaintiff's condition was said "The treatment would be first a palliative treatment," as described by him. There is no evidence that this palliative treatment has ever been given. The only detailed treatment given testified to by Dr. Way, whose testimony is the only evidence offered on this subject, is that he gave her something to quiet her nerves, local heat applications over the bruised areas and treatment of the wounds with proper antiseptics and rest. While he testified that he called upon the plaintiff several times at her home and that she called at his office several times, there is no evidence that any tight bandages like a corset were used or that any diet of carbohydrate foods were prescribed, or used by appellee, and there is no evidence that, except for a few days immediately after the injury, that appellee has attempted to follow the surgeon's advice as to rest. Two other surgeons testified for appellee, but neither stated that in his opinion she was afflicted with a floating kidney, in fact, did not mention that subject. It is apparent from the testimony of Dr. Way that if the palliative treatment was followed by appellee, as described by him, then no operation might be necessary. There is no evidence that the doctor prescribed such





a treatment or that appellee followed one of such a character. Nor is there any evidence that appellee contemplated having any such operation performed. Under such circumstances the evidence in regard to the operation and the expenses thereof was but speculative and conjectural and incompetent. The eighth instruction given on behalf of appellee informs the jury that in estimating her damages they may take into consideration her health and physical condition prior to and since the injury so far as shown by the evidence and further, "And if you believe from the the evidence that her health and physical condition has been impaired as a direct result of such injury, you may take that into consideration, and also to what extent, if any, she will endure physical and mental suffering in the future as a natural and inevitable result of such physical injury, if shown by the evidence, also any expenses she will necessarily be put to in and about caring for and curing herself of any impairment of health, if any has been shown by the evidence to be direct and proximate result of such injury." Dr. Way testified that such an operation, if performed, might result in death and while on motion this was stricken out by the court, yet it was made in the presence of the jury and under this instruction the jury might have considered her mental suffering oc-



caused by fear of possible death from the operation. The only evidence of any future expenses to which the plaintiff might be subjected to were the expenses of a possible future operation .

In the case of **Lauth v. C. U. T. Co.** 244 Ill. 244, an accident to the plaintiff resulted in a hernia. This hernia developed at times into a strangulated hernia. It was shown by the evidence that any hernia may become strangulated at any time without any premonition. The doctor who testified on behalf of the plaintiff in that case described the conditions which caused strangulation and that several times he had reduced it by simple methods and put a truss over it. He was asked the following question: "Suppose a hernia is strangulated and it is not, as you call it, reduced or put back,—the intestine or bowel is not put back into the abdominal cavity but remains out through the ring,—what is the effect?" The witness answered, over objection, "The strangulation prevents circulation and causes destruction of that portion of the bowel beyond that portion of the bowel where the strangulation occurs; mortification will come from want of nourishment and death will ensue." A motion to strike out the answer on the ground that it was purely speculative was overruled. The





court said in passing upon the competency of the above evidence: "In this class of cases, in estimating the pecuniary loss, all the consequences of the injury, future as well as past, which are shown by the evidence to be reasonably certain to result from the injury, are to be taken into consideration. \* \* \* To form a proper basis for recovery, however, it is necessary that the consequences relied on must be reasonably certain to result. They cannot be purely speculative." The court then cites the case of **Strohm v. N. Y. L. E. and W. R. R. Co.** 96 N. Y. 305, in which it is stated: "Consequences which are contingent, speculative or merely possible are not proper to be considered in ascertaining the damages. It is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury, nor even that they are likely to so develop. To entitle a plaintiff to recover present damages for apprehended future consequences there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury." The court also cites the case of **Chicago City Ry. Co. v. Henry**, 62 Ill. 142, to the effect: "It is true, no one can determine with absolute certainty what the result of such an injury might be;



but something more than mere conjecture, mere probabilities, should appear to warrant the giving of damages for future disabilities that may never be realized." In the Lauth case, *supra*, the court further holds: "This error is not cured or in any way affected by the remittitur required by the superior court. It would be impossible to determine to what extent the verdict of the jury was influenced by this incompetent testimony, which opened the door for an award of damages for mental anguish suffered on account of impending death. The action of the trial court in requiring the remittitur is conclusive that the verdict was far in excess of the actual damages. Where an error has been committed as to some substantive fact which bears upon the right of recovery or the measure of damages in respect to some matter which is not susceptible of computation, a remittitur will not cure it." In the case of **Lyons v. Chicago City Ry. Co.** 258 Ill. 75, the doctor there testifying in regard to the results of an injury, was permitted to state, over objection, that the plaintiff in that case might have had a fracture of the skull. A verdict was returned assessing plaintiff's damages at \$7,000.00, and the court required a remittitur of \$2500.00. In the opinion of the court it was held: "It maybe that this improper evidence accounted for a large part of the verdict. Such





an error in the admission of evidence is not susceptible of computation, and even a remittitur cannot cure it." In the case of **Chicago City Ry. Co. v. Henry**, 218 Ill. 92: "One of the two principal injuries which plaintiff claimed he had suffered from the accident was a hernia. The doctor who had treated him, testifying in his behalf, described a hernia and stated to the jury its effect upon his health, both in the past and in the future. He testified that it would weaken the plaintiff and make him nervous and that he had recommended him to have an operation performed, but none had ever been performed and there was no evidence tending to show that one was contemplated or would be required. It was not a case where the surgical operation must be performed but was a case where the plaintiff might have it performed or not, as he saw fit. The doctor testified as to the usual, ordinary and customary charge for medical and surgical services which he had rendered to the plaintiff, and he was then asked what such an operation as he referred to for curing the hernia would cost. The defendant objected to the question. The court, before ruling on the objection, asked the witness if he knew what a man in plaintiff's station in life would have to pay to be properly operated upon by a competent surgeon. The witness answered that he did, and the court then said that he



could tell the jury. The defendant excepted to the ruling, and the witness answered, "About \$250." The question was improper and the evidence incompetent in any view of the case. Not only had no expenses for a surgical operation been incurred but there was no evidence that any operation was contemplated, \* \* \*."

It was error, under the facts as they appear in this record, to permit Dr. Way to testify as to the necessity and cost of such an operation and the remittitur entered by the court will not cure the error. It is submitted by counsel for appellants that an injury resulting in a floating kidney is a permanent one and that no evidence of a permanent injury is admissible because there is no allegation to that effect in the declaration. This is not an action for injuries resulting from negligence, but for those resulting from a trespass *vi et armis* to the body of appellee and in such an action the plaintiff can give in evidence any matters tending to establish the nature, character and extent of the injuries received, which are the direct and natural consequences of the trespass. **Tinsley v. Rowe**, 17 Ill. App. 326. The defendants offered to prove many aggravating circumstances during a period of two years prior to the day of the litigation in mitigation of exemplary or punitive damages. In order to make such evidence competent the facts must be so recent and immedieate as to induce a presumption





that the violence done was committed under the immediate influence of the feelings and passions excited by it. **Huftalin v. Misner**, 70 Ill. 55; **Cummins v. Crawford**, 88 Ill. 312; **Sorgenfrei v. Schroeder**, 75 Ill. 397. The incidents referred to were too remote and it was not error to exclude them.

Mrs. Sparks testified that Mr. Sparks had erected the fence but the court refused to permit her to testify as to who paid for the fence or on whose lot the fence had been placed and counsel for appellants claim that it was competent to prove that the appellants placed the fence on their own property and at their own expense in order to show that the assault was necessary to protect their own property from damage by appellee. Technically upon the theory of appellants that appellee was damaging or attempting to damage their fence and plants located on their own property they had a right to prove these facts for what it was worth.

For the errors hereinabove indicated the judgment is reversed and cause remanded.



7059a

250 I.A. 669

General No. 8217

Agenda No. 12

APRIL TERM, A. D., 1928

Paris Loan Company, Appellee,

vs.

E. E. Jones, Executor of the Estate of Eda May  
Shopp, Deceased, Appellant

Appeal from the Circuit Court of Edgar County.

SHURTLEFF, J.

This is a suit on a claim filed in the County Court of Edgar County on the probate side of the court by the Paris Loan Company against the estate of Eda May Shopp, deceased. The "Paris Loan Company" consists of Max Blumberg and six others, doing business under that name since January 1, 1925. Under the title set out they secured a license from the State of Illinois to do business in Paris, Edgar County, "Under an act to license and regulate the business of making loans in the sum of three hundred dollars or less, secured or unsecured, at a greater rate of interest than seven per cent. per annum, prescribing the rate of interest and charge therefor and penalties for the violation thereof, and regulating the assignment of wages or salaries earned or to be earned, when given as security for any such loan," etc. "Approved July 14, 1917."

In 1924 Max Blumberg was the sole owner of the business and under the same name secured a license to do a similar business at the same place and had blanks printed for that purpose. On January 1, 1925, the brothers and relatives were taken into the firm, a new license procured, and the same business continued. On July 25, 1925, Eda M. Shopp (then in her lifetime) procured a loan from said firm and executed her note for the sum of \$250, payable to the order of "Max Blumberg doing business under the





name of Paris Loan Company," upon one of the form notes used by Max Blumberg during the year 1924, and a chattel mortgage to secure the payment of said note. It is not disputed but that the amount is a bona fide debt due to appellee, consisting of said members, and that the amount of the judgment correctly represents the amount of the indebtedness. The Probate Court allowed the claim and upon an appeal to the Circuit Court of Edgar County and a trial without the intervention of a jury there was a judgment for appellee in the amount of said claim and costs, and appellant has brought the record to this court, by appeal, for review.

No exception has been taken in either court below as to the form and title in which appellee sues, and the question is not raised in this court. Appellant contends that the note being payable to Max Blumberg, by its terms, and Max Blumberg since January 1, 1925, having no license individually to engage in said business, the giving of said note violates the terms of the act, and that the note and chattel mortgage are void. We cannot agree with this contention. We do not find any provision of the law requiring such loans to be represented by promissory notes, or even to be in writing. We are unable to find any provision of the law which the conduct or mistake of the parties in this case violated. The proofs show that Max Blumberg did not make this loan individually, but that it was made by the firm as constituted on July 25, 1925, under a proper license, and that while an error was made in the blank form of note used, the debt, in equity, was due and payable to appellee. This being a claim presented to a probate court in the settlement of an estate, the rule laid down in **Thomson v. Black**, 200 Ill. 468: "In allowance of claims against estates the probate court disregards mere matters of form and looks to the substance. (**Wolf v. Beaird**, 123 Ill. 585.) In a matter where equitable relief is required



the court will adopt forms of equitable procedure, and in other cases will secure to parties the rights allowed to them by law, for the purpose of arriving at an adjustment of the claim," applies and determines the issues in this case.

Finding no error in the record, the judgment of the Circuit Court of Edgar County is affirmed.

Affirmed.





7060a  
General No. 8224

250 I.A. 669<sup>2</sup>

Agenda No. 18

APRIL TERM, A. D. 1928

People of the State of Illinois for the Use of George  
W. Stubblefield, Appellant,

vs.

Albert Wochner, Edward T. Fahey and C. F. J. Agle,  
Appellees

Appeal from Circuit Court of McLean County.

SHURTLEFF, J.

This is an action brought by appellant upon the official bond of George E. Flesher, at one time sheriff of McLean County, to recover damages for an assault and unlawful search charged to have been made by said sheriff upon the person of one George W. Stubblefield, usee, upon the 10th day of January, 1917. The praecipe for this suit was filed with the clerk of the Circuit Court of McLean County on April 8, 1927. The declaration attempts to charge a tort or trespass committed on January 10, 1927, and further charges that in said assault and by way of aggravation of damages that a certain promissory note was taken away from said usee and impounded with the clerk of the Circuit Court of McLean County, and that said note was involved in another chancery suit pending in said court between said usee and other parties, and that the note only came into the hands of the usee at the conclusion of said other suit and the release of said impounding order on April 22, 1922. This suit, however, is not brought to recover the note or its value, but is brought upon the tort to recover damages for the assault. There were various pleas presented by appellees to the declaration in addition to the general issue. Appellees pleaded the Statute of Limitations, both the five-year period and the ten-year period. Further, appellees pleaded former adjudication and set out in full all of the proceedings and judgment in the Circuit Court of McLean



County in the cause and proceeding that was later in this court as General Number 8042, at the October Term, 1926, and fully reported in 244 Ill. App. 30, as well as the proceedings of said cause in this court and the final remanding order in the same.

To said last plea in the court below appellant attempted to make an issue of fact that said cause was not tried upon its merits in the Circuit Court of McLean County but was determined upon a demurrer to the pleadings which did not determine the issues in said cause. We speak with some hesitation, inasmuch as the abstract in this cause, presented by appellant, is insufficient and defective and does not set out the proceedings as required by the rules of this court, and appellant's brief is incoherent and uncertain and affords little, if any, light as to what did take place in the court below. We have been compelled to resort to the record and The People for the use of *Stubblefield v. Wochner, et al*, *supra*, to secure enlightenment in regard to this case. This appeal should be dismissed for want of a sufficient abstract and brief, and we would dismiss it except to do so might cause its infliction upon the Circuit Court of McLean County or this court again.

The Circuit Court of McLean County instructed the jury to find a verdict for appellees and there was a verdict and judgment for appellees and appellant has appealed.

It is charged as error that the court refused appellant a change of venue upon a petition filed. At a later term of court, after the commencement of the action, appellant did present a petition praying for a change of venue, based upon the charge that one of the judges of the circuit was prejudiced against him and stating that "the knowledge of such prejudice did not come to affiant until within the past twenty days." No notice was given under the statute of such application. The denial of such application was not error. (Sec. 6, chapter 146, Revised Statutes; *Miller et al, v. Pence*, 132 Ill. 149.)





Appellant complains that the court erred in denying appellant's motion to compel appellees to elect whether they would rely upon the five-year statute of limitations or the ten-year statute. We know of no law or rule that prevents defendants in this state in suits at law from filing as many pleas to the declaration as they see fit, and where any plea filed is sufficient to bar the suit, the plea is good. The difficulty with appellant's contention is that the record shows that his suit was barred by both statutes. Appellant cites numerous cases holding that, "The Statute of Limitations does not run while an action to recover the matter in dispute is pending" (**Nevitt v. Woodburn**, 160 Ill. 212), and cites section 23 of the Limitations Act: "When the commencement of an action is stayed by injunction order of a judge or court or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action," etc., and contends that while said note was impounded in the chancery suit, to which appellees were not a party, the Statute of Limitations as to his tort action did not run. Appellant mistakes the nature of this action. It is not brought to recover the note or its value, but is brought to recover damages for an assault, a part of which may be the purloining of the note. The note or its existence or its value could have no bearing upon the present suit, except it might have been evidence in aggravation of damages, and the note itself was equally available as evidence in the hands of the court as it would have been in possession of appellant. Appellant is in no different position than one suing for personal injuries resulting from gunshot wounds, in which one ball fired damages his wooden leg. No one would contend that the detention of the wooden leg by another by a process of law would abate the running of the Statute of Limitations as to the general injury.

It is further contended that upon the former hearing of this cause (**People for the Use of Stubblefield v. Wochner, et al**, 244 Ill. App. 30-, that the cause was decided upon defective



pleadings and not upon its merits, and that it is not, therefore, **res adjudicata** of this suit. We have examined the record of this suit fully and also are very familiar with the issues in the former suit. They are identical. In the former suit it was held that the appellant had five years within which to bring his action and that not having brought his action within five years from its inception the cause of action was barred. This holding resulted from the pleadings in the case. The defendants pleaded the five-year Statute of Limitations and appellant demurred, admitting for the purpose of the hearing, that the five-year period had run. The court overruled the demurrer. Appellant stood by his demurrer, which was a solemn admission of record that the period of five years had run. Upon this issue the cause was decided and final judgment entered, both in the Circuit Court and in this court. This was a decision upon demurrer of the merits of the cause and bars a subsequent proceeding upon the same facts. (**Foss v. People's Gas Light Co.**, 293 Ill. 94; **The Marie Methodist Church v. Trinity Church**, 253 Ill. 21.)

Much is stated in appellant's brief and cases cited as to the Statute of Limitations and cases based upon a written instrument and the ten-year period, etc. Suffice it to say that if we have not made this feature of the case plain in **The People for Use of Stubblefield v. Wochner et al**, *supra*, we shall not attempt it in this case. Appellant is not suing to recover a money judgment nor is the claim sued upon even liquidated. The suit is brought to recover damages for a tort claimed to have been committed by the sheriff, and the sheriff is not made a party to the suit. The sureties upon the bond are entitled to the same period of limitations that the sheriff would be entitled to on a suit brought against him.

Much more could be said from this record in affirmation of the verdict and judgment. The whole case is a mere attempt to retry the issues and merits of the cause between the same





parties that were submitted in the former suit cited in this opinion, all of which had been settled by the judgment of the Circuit Court of McLean County and by this court. The reflections cast by counsel for appellant upon the testimony of the two witnesses, John C. Allen and J. Huber Allen in appellant's brief are unmerited and not in any manner warranted by the record, and appellant's criticisms upon the rulings of the court rather reflect the lack of erudition on the part of appellant's counsel than any error committed by the trial judge.

The judgment of the Circuit Court of McLean County is affirmed.

Judgment affirmed.



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The judgment of the Circuit Court of McLean County is affirmed.

Judgment affirmed.





STATE OF ILLINOIS.

APPELLATE COURT

4TH. DISTRICT.

250 I.A. 669<sup>3</sup>

OCTOBER TERM, A. D. 1927.

TERM NO. 64.

AG. NO. 19 .

C. S. SMITH,  
Appellee,

VS.

ILLINOIS STATE TRUST CO.,  
Appellant.

APPEAL FROM

EAST ST. LOUIS

CITY COURT.

Barry, P. J. - The declaration in this case charged that appellant was the agent of the owner of a certain apartment building and was in possession and control thereof; that appellee was a tenant in said building and occupied an apartment on the ground floor; that the building was heated by an oil heater which had become and remained out of repair for some time prior to December 3, 1926; that oil was permitted to escape from the pipes in large quantities and to remain upon the floor of the room in which the heating plant was located; that on the day aforesaid a fire resulted from the combustion of the oil which had so escaped and that appellee's household goods, wearing apparel and furniture were largely consumed and damaged thereby.

Appellant pleaded the general issue and also a special plea in which it averred that it did not have the possession and management or control of the heating plant mentioned in the declaration; that it was not guilty of any of the acts of negligence charged;



that it was not at any time acting as the agent of the owner of the premises, etc. The trial resulted in a verdict and judgment for \$924.43.

Appellant's secretary testified that appellant was collecting the rents from the tenants in the building at the time of the fire. He said he did not recall whether appellant had a written contract with the owner of the property; that he was not prepared to state as to whether appellant had a contract that put the entire control and management of the property in the hands of appellant. He further said:- "I don't know whether we have a contract or not. I am not sure -- there may be". He also testified that appellant has a mortgage on the property and collected the income therefrom; that appellant makes the disbursements, pays the taxes and pays all the help that is employed there.

Mr. Mattingly testified that he was the collector for appellant and had the premises in question in his charge; that appellee paid two months rent to appellant while he lived in the flat prior to the fire; that appellee paid his rent at appellant's office. He says that he had nothing to do with the building other than to collect the rent and that he began collecting the rents for appellant October 1, 1926. He says that Mr. Walker was the janitor for the building; that it was Walker's duty to do a little of everything and to look after the furnace; that the oil plant was in operation about two months before the fire.

Mr. Walker testified that he was employed by appellant as janitor about three months before the fire and that appellant paid him for his services; that he had charge of the oil burner and was there at the time of the fire; that the burner had not been working satisfactorily but he did not notify appellant; that Mr. Mattingly brought orders to him from appellant's secretary but that the secretary never issued any order about the burner. He says that the nozzle was not the right size and it would not throw the oil out and burn it properly; that the burner would get full of carbon;



and to remove all the copies of the report of the Board of the  
University, etc. The Board decided in a meeting on September 20,  
1901.

[illegible]

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a genuine organization or a front organization for the Government of the United States.

and more it is possible that some of the people who are now in the country are the same people who were in the country in 1945. It is possible that some of the people who are now in the country are the same people who were in the country in 1945. It is possible that some of the people who are now in the country are the same people who were in the country in 1945.

and he would have to shut it off and clean out the boiler and it would leak down from the burner and he would put a little bucket in there to catch the oil and later he would throw the oil back in. That about two or three gallons leaked from the nozzle; that some of the oil flowed over the bucket on to the floor; that the boiler was about two feet below the level of the floor and that the oil ran under the boiler into this depression in the floor.

Other witnesses testified as to the conditions existing prior to and immediately after the fire started. The undisputed evidence shows that there was a large quantity of oil that had escaped and that was where the fire started.

We are of the opinion that the evidence was sufficient to establish a cause of action against appellant under the following cases:- Baird vs. Shipman, 132 Ill. 16; Rising vs. Ferris, 216 App. 252; and Smith vs. Pawlak, 136 App. 276. That being true the Court did not err in refusing to direct a verdict in favor of appellant. We find no substantial error in the giving or refusing of instructions. The judgment is affirmed.

*Not to be reported* AFFIRMED.

[illegible]

Not to be repeated







### III. Unpublished opinions

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# 111. Unpublished opinions

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